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The Four Eras of FCC Public Interest Regulation

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TABLE OF CONTENTS

INTRODUCTION

The Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*[1] has been both valorized and demonized as representing a turn to a positive, democracy-based theory of the First Amendment. Instead, this Essay looks at *Red Lion* principally as a case demonstrating judicial deference to Congress and to the Federal Communications Commission's (FCC or Commission) decisions in regulating the spectrum commons. The inquiry takes a granular look at what the FCC has done with public interest content regulation since the inception of radio. That look reveals administrative experiments with a variety of public interest interpretations. Specifically,

* Professor of Law, University of Miami School of Law. Many thanks are due to Mary Coombs, Bernie Oxman, Steve Schnably, and Ralph Shalom for their comments. This Essay is based on remarks originally presented at the Symposium "Does *Red Lion* Still Roar?", on April 18, 2008, at American University–Washington College of Law. All errors are mine.

1. 395 U.S. 367 (1969).

the FCC's experiments reflect four regulatory periods: (1) the "melting pot" approach; (2) the community representation approach; (3) the deregulatory, market approach; and (4) the targeted reregulatory approach principally geared to the protection and education of children.

Through the years, the focus of the interest being protected by FCC regulation has narrowed considerably. In the melting pot era, the interest lay in encouraging homogeneous media that served to provide American society with a single assimilative voice. In the community representation period, the FCC shifted from trying to encourage a single voice to trying to preserve the voices of smaller communities within the broader society. During these first two regulatory eras, the Commission equated the public interest with community identity, although it defined the notion of community differently. In the market era, the agency abandoned efforts to encourage any particular voice and allowed broadcasters more flexibility in the expectation that the market would prompt stations to provide the programming desired by the public. That marked a shift in the focus of regulation from the community to the individual broadcast consumer.

The most recent period of hybrid reregulation is more ambiguous. On the one hand, the Commission's actions suggest that it has limited its regulatory focus to the needs of a single constituency—children—and narrowed its definition of the public interest even beyond the individual television viewer. The FCC has simultaneously articulated a consumerist, market approach and exacted what it has claimed to be a limited and targeted child-related quid pro quo from broadcasters. Looked at differently, however, the current FCC has used child protection as an umbrella rationalization for setting the contours of general public discourse. And it has done so apparently at the behest of conservative advocacy groups while claiming to have been drafted to regulate by a general public disgusted with coarse television fare.

The shift in the FCC's focus has been accompanied by technical and economic developments that have fragmented the market for media services generally. With the advent of cable television, over-the-air broadcasters faced many new competitors able to focus on narrower audience segments. As the blogging phenomenon and websites such as YouTube have contributed to the growth of Internet media, the market has become further fragmented. The effect is to leave broadcasters and newspapers with much smaller audiences and greater financial pressures.[2] The fragmentation of media markets has forced broadcasters (as well as

2. *See generally* PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008 (2008), http://www.stateofthenewsmedia.com/2008 (reporting that broadcasters are experiencing diminishing audiences while print media outlets are collecting less classified ad revenue).

newspapers) to scale back their investments in journalistic resources substantially.[3] Product placement now occurs even on news shows.[4] Broadcasters are limiting their focus on investigative journalism[5] and cable's conception of journalism is far closer to what has been called the "argument culture" than a rich and nuanced notion of journalism.[6] Corporate consolidation, public ownership, and Wall Street's focus on share prices have created further challenges to journalistic norms and editorial independence.

While the new media environment may well provide a greater variety of viewpoints and opportunities for self-expression, it does not make up for the lost resources for traditional journalism. Even while the market for broadcast media has shrunk, broadcast still has the broadest reach and the greatest opportunity to create a national dialogue on matters of public interest.[7] This Essay suggests that the public interest currently (and most sorely) needs a reinvigoration of traditional, searching journalism in the electronic media. In 1941, the FCC said that "[r]adio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented."[8] Broadcasting can still serve today as such an instrument of democracy, but only if it pursues serious, independent journalism (whether or not "objectively presented"). The enhancement both of the journalistic focus

3. *See* Lili Levi, *A New Model for Media Criticism: Lessons from the* Schiavo *Coverage*, 61 U. MIAMI L. REV. 665, 683–84 (2007) [hereinafter Levi, *A New Model*] and sources cited therein (listing reductions in news organizations' resources for investigative reporting, research, verification, fact checking, staff, and foreign news bureaus).

4. Stephanie Clifford, *A Product's Place Is on the Set*, N.Y. TIMES, July 22, 2008, at C1 (describing McDonald's coffee cups on morning news anchors' desks).

5. *See, e.g.*, Marisa Guthrie, *Investigative Journalism Under Fire*, BROADCASTING & CABLE, June 23, 2008, http://www.broadcastingcable.com/article/CA6572223.html (citing conflicts of interest with parent corporations and the growing potential for expensive lawsuits as economic concerns that limit investigative reporting); *Investigative Reporters Face Time Crunch*, BROADCASTING & CABLE, July 2, 2008, http://www.broadcastingcable.com/article/CA6575088.html (citing budget cuts and shorter viewer attention spans as reasons for spare and shallow investigative reports).

6. *See, e.g.*, BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 139–43 (1st rev. ed. 2007) (noting that one of the driving forces behind the "argument culture" is that it is less expensive to produce a talk show than it is to do investigative reporting and deliver news); DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998); Levi, *A New Model*, *supra* note 3, at 688, 694–96 (listing eight economic and structural factors that have contributed to "blurring of the distinctions between news and opinion and between news and entertainment").

7. *See, e.g.*, Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 153 (2006) [hereinafter Varona, *Out of Thin Air*] (stating that free broadcast television is still "the *only* conduit to regular news, political information, cultural enrichment, education, and democratic engagement" for many Americans).

8. Mayflower Broad. Corp., 8 F.C.C. 333, 340 (1941).

and the credibility of mass electronic media should be the current goal of media policy. This Essay urges the Commission to explore the ways, if any, in which it can help the electronic mass media develop into credible journalistic resources.

Yet it is also clear that such a goal cannot be accomplished through the simple readoption of content controls such as the Fairness Doctrine, for reasons that have been powerfully articulated in prior scholarship.[9] The question, then, is what the Commission can do—short of traditional command-and-control interventions—to promote the goal of a strong and credible electronic press. If the most significant public interest role of radio and television today could be to provide credible journalism for vast populations, and if it is true that a market-based conception of the public interest is unlikely to promote such journalism in today's media environment, then the Commission can indirectly regulate media structure to induce more investment in such fare.[10] In addition, the Commission could investigate incentive-based regulation[11] or expenditure requirements designed to promote broadcaster investment in news.[12]

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9. The Fairness Doctrine was officially adopted by the Federal Communications Commission in 1949. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257–58 (1949) (Report of the Commission). For a recent history of the Fairness Doctrine, see Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 18–26 (2004) [hereinafter Varona, *Changing Channels*]. *See also* Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After* CBS*?*, 122 U. PA. L. REV. 1283, 1284–86 (1974) (discussing the operation of the Fairness Doctrine). For sources criticizing the Fairness Doctrine, see *infra* note 140.

10. For others who suggest structural regulation to enhance news and journalism, see C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007); and Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547 (2008).

11. For a discussion of the benefits of subsidy-based media regulation, see, for example, Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004), and Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217 (2002). *But see* Candeub, *supra* note 10, at 1554 (expressing doubts about the wisdom of government speech subsidies).

12. *See, e.g.*, Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321 (2007) (proposing regulations that require broadcasters to spend a certain percentage of advertising revenue on "public affairs production and programming"). This is not an argument that the First Amendment requires the government to improve the speech marketplace. Nor is it to say that journalistic values are clear and uncontroverted, or that we can be certain about what particular regulations are likely to enhance the journalistic enterprise, or that it would be easy to determine whether the Commission's interventions have been successful, or even that indirect, incentive-based regulations don't raise troublesome questions about government-pressured speech. *See, e.g.*, Levi, *A New Model*, *supra* note 3, at 677–80 (discussing internal limits on journalistic standards); *see also* Candeub, *supra* note 10 (expressing doubts about nonstructural content regulation).

Thus, this Essay argues that instead of completely abandoning public interest regulation or simply limiting it to purportedly child-protective interventions, it is now an opportune moment for the FCC to investigate a reframed return to the early, community-building conception of the public interest—but with a very different regulatory focus and alternative regulatory methods.[13] This inquiry would be useful, even considering prior agency failures to preserve the public interest and concerns admitted below about the apparent politicization of the Commission today.[14] Numerous critics flatly reject the viability of public interest broadcast regulation.[15] However, a Commission inquiry could be a catalyst to public debate. Such a debate could be useful in itself. And it might have some impact on the Commission.[16] Moreover, the discussion might engage more than media activists. Depending on the nature of the proposed regulations, broadcasters would not necessarily oppose them. Their position would likely depend on a number of factors that cannot be analyzed in advance and in the abstract. Issues such as their perception of other regulatory needs at the time and whether they think they can benefit from the proposed rules are likely to be significant factors.[17] All this is to say that

13. Of course, any product of Commission rulemaking following an inquiry would likely be challenged in court. While some D.C. Circuit panels have been skeptical even of structural media regulation in recent years, there are reasons to think that at least some regulations might survive scrutiny: *Red Lion* still remains; some on the Supreme Court continue to be swayed by historical arguments for regulation in the broadcast context; the D.C. Circuit's interest in empirical evidence of problems and metrics to judge the adequacy of regulatory responses can be satisfied; and content-neutral spectrum fee-type suggestions to promote journalism would not necessarily be inconsistent even with the D.C. Circuit's purportedly new approach to Federal Communications Commission (FCC or Commission) review.

14. *See infra* note 43 and accompanying text.

15. *See infra* note 42 and accompanying text.

16. An inquiry can serve as a salutary invitation to public engagement. If a Commission inquiry is taken seriously by the public and engages people interested in media policy, the Commission will be faced both with much to think about in the responses generated by its inquiry and with the public pressure generated by the responses. Admittedly, critics have complained that the Commission does not seriously entertain public comment on its regulatory initiatives. *E.g.*, Mary M. Underwood, Comment, *On Media Consolidation, the Public Interest, and Notice and Agency Consideration of Comments*, 60 ADMIN. L. REV. 185, 200–06 (2008); *cf.* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 125–33 (2008). However, "few agency decisions with significant stakes escape public attention or participation completely." CROLEY, *supra*, at 292. One example—the public response to the agency's 2003 ownership deregulation proposals—has clearly been noticed by the Commission. For a description of the grassroots movement to reform modern media in the context of the battle over the FCC's attempt to roll back some of its media ownership rules in 2003, see, for example, THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY (Robert McChesney et al. eds., 2005).

17. If, for example, some important broadcasters think that a reputation as an excellent and credible news source is valuable as part of their branding, but if that reputation is not

we cannot necessarily assume that the political context today will lead to the same results as in the market era. Perhaps it is time to revive and rethink the public interest for radio and television.

I. READING *RED LION*

Red Lion is the Supreme Court's most famous and most controversial statement of the FCC's role in public interest regulation.[18] Many scholarly admirers of *Miami Herald Publishing Co. v. Tornillo*[19] have rejected the First Amendment exceptionalism with which the *Red Lion* Court appeared to treat broadcast content regulation.[20] They focus on the failure of the scarcity rationale to justify content-based regulation of speech.[21]

Yet scarcity in the obvious sense of a limited physical resource does not

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worth a financial investment much larger than that made by competitors, then the imposition of requirements that would place all broadcasters on an equal footing might reduce the comparative disparity in losses.

18. *See, e.g.*, C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 955 (2007) (describing *Red Lion* as probably the Court's "most famous broadcasting case").

19. 418 U.S. 241, 258 (1974) (finding that a state's right-of-reply statute for newspapers violated the First Amendment).

20. For discussions of broadcast exceptionalism, see, for example, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 85–90 (1991); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 262–63 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197–209 (1987); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST 7–18 (1986); Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005); Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976); Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1403 & n.310 (2005); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 908, 926–30 (1997) [hereinafter Hazlett, *Physical Scarcity*]; Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349 (1985); Varona, *Changing Channels*, *supra* note 9; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1106 (1993); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003); *see also* William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 574 (1978) (arguing that even if the *Red Lion* result is constitutionally defensible, it may still have been "a [F]irst [A]mendment misfortune").

21. For the seminal attack on broadcast scarcity as a justification for differential regulation, see R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1, 12–17 (1959). As Dean Jim Chen has characterized the critics, "Dissatisfaction with *Red Lion* has spawned an academic cottage industry." Chen, *supra* note 20, at 1403 & n.310 ("No one besides the Supreme Court actually believes the scarcity rationale.") and sources cited therein; *see also* Yoo, *supra* note 20, at 267–69 (explaining the "Analytical Emptiness of Scarcity").

capture the core of *Red Lion*.[22] *Red Lion* is most usefully understood as a case of deference to Congress and expert agencies in addressing the allocation of rights in a commons.[23] As Professor C. Edwin Baker has

22. *See, e.g.*, Jim Chen, *Liberating* Red Lion *from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. TELECOMM. & HIGH TECH. L. 293, 299 (2002) ("Careful examination of *Red Lion* . . . reveals no fewer than three distinct justifications for tailoring [F]irst [A]mendment protection according to the characteristics of a specific conduit."); Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1226 (2007) ("*Red Lion*'s analysis obscured the importance of market structure to the analysis by relying on the poorly conceived spectrum scarcity rationale."); Richard E. Labunski, *May It Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era*, 11 HASTINGS COMM. & ENT. L.J. 219, 268–69 (1989) (reading *Red Lion* as "based on the principle that restricted *access* entitles the government to regulate"); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1659–60 (1998) (describing—albeit questioning—*Red Lion* as an example of "the Supreme Court's deference to regulations that it can characterize as market-structuring rather than ideological").

Some ground public interest regulation of broadcast content on notions of public property. *Spectrum Management Policy: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 37, 46 (1997) (statement of Reed Hundt, Chairman, Fed. Commc'ns Comm'n) (testifying that public ownership justifies public interest obligations for broadcasters); *see also* Robinson, *supra* note 20, at 911–12 (discussing the public property argument). Yet others link *Red Lion* to the doctrine of public fora. *See, e.g.*, Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1708 (1997); Varona, *supra* note 7. Still others rely on a quid pro quo argument to justify regulation. *See, e.g.*, Michael M. Epstein, *Broadcast Technology as Diversity Opportunity: Exchanging Market Power for Multiplexed Signal Set-Asides*, 59 FED. COMM. L.J. 1, 3 (2006). Professor Monroe Price, in describing the perspectives of early radio policymakers (such as Herbert Hoover), points to the following view:

> Here, the scarce commodity is not spectrum, but rather information and culture; its supply should not be controlled in ways that might be abusive, and access to it should be rendered in ways that are just. . . . Much of the early rhetoric . . . reflected a patrician sense of national purpose and national propriety. . . .
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> For [Hoover] and his colleagues, it was the power of radio, not just the scarcity of spectrum, that motivated concern for the new technology's relationship to American democracy. The right of an individual to use the ether was a privileged access to a kind of public magic, conferred upon condition.

MONROE E. PRICE, TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY 161–62 (1995).

23. The need to regulate to stave off commons problems is not unique to broadcasting. For the classic description of the tragedy of an unregulated commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). We have a tradition of the Public Trust Doctrine in aspects of property law. For a seminal article on the Public Trust Doctrine in the environmental context, see, for example, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Long-established precedents permit price regulation of businesses affected with a public interest. *E.g.*, Munn v. Illinois, 94 U.S. 113 (1877). Professor Carol Rose has also written about the seeds in common law of protection for "inherently public property." Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 721–23 (1986). Some have argued for expanding the Public Trust Doctrine to the electromagnetic spectrum. *E.g.*, Patrick S. Ryan, *Application of the Public-*

explained, broadcast frequencies present the problem of the commons: "[T]he limited availability of a valuable resource (scarcity of land or broadcast frequencies), combined with the absence of some form of governmental (or social) allocation of usage rights, results in overuse, making the resource worthless to everyone."[24] The *Red Lion* Court recognized that when the government is faced with the possibility of a tragedy of the commons, it has the obligation to regulate.[25] Under those circumstances, the Constitution allows broad deference to both congressional and administrative decisions about the way to do so. The *Red Lion* Court read the First Amendment as allowing a significant amount

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Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum, 10 MICH. TELECOMM. TECH. L. REV. 285 (2004). *See also* Thomas B. Nachbar, *The Public Network*, 22 COMMLAW CONSPECTUS (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009641 (arguing that the Public Trust Doctrine could be a useful analytic approach to deal with issues of net neutrality).

The question, of course, is whether the legal categories used in other contexts implicating commons problems can simply be translated into the context of content regulation in communications. In 1929, for example, an article in the *Yale Law Journal* discussed the possibility that Federal Radio Commission regulatory power could be grounded on the doctrine of businesses affected with a public interest:

> Broadcasting possesses enough of the elements commonly required so that the courts may label it as such if they so desire. It is a business of greatest importance to the public; it is not one where competition will protect the public interest; it may even be said that it has been "granted" or "devoted" to the use of the public. . . . Yet . . . they [the courts] do not appear ever to have used the doctrine to justify such a strict regulation as the requirements of radio would seem to demand. The device was used originally for fixing rates. . . . And the regulation permitted under it has never proceeded much beyond this . . . .

Julius Henry Cohen et al., Comment, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 245, 254 n.46 (1929). This doctrinal reading may have continued, but it is also useful to observe along with Eben Moglen, that broadcasters have been thought to be businesses affected with a public interest "because they have become essential social facilities. As far as broadcasters are concerned, the public interest is that they are the primary news distribution system for all but a few." Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 951 (1997).

24. C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 102 (1994). Additionally, Professor Baker notes that

> [t]his chaos/commons quality arguably provides the best understanding both of federal intervention in broadcasting and of the Court's opinions in crucial cases such as [*Red Lion*]. The standard view—which may be more easily described, but which is also more vulnerable to savage and effective critique—is that an inherent scarcity of broadcast frequencies justified government regulation.

C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 861 n.114 (2002) [hereinafter Baker, *Media Concentration*].

25. Justice Frankfurter recognized that need to regulate in another seminal early broadcasting case as well. NBC, Inc. v. United States, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.").

of leeway for congressional and administrative interpretations of the First Amendment in circumstances in which there is no choice but to regulate. While a licensing regime is not the only permissible regulatory solution,[26] Congress is not precluded from choosing such a regime.[27] And when it does so, it is not precluded from choosing to make allocations reflect more than mere purchasing power.[28] As the Court put it in *Red Lion*, "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[29] The *Red Lion* Court's assertion that "[i]t is

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26. Van Alstyne, *supra* note 20, at 561–65. The Court later said in *CBS, Inc. v. Democratic National Committee* that "once it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between private and public control." 412 U.S. 94, 104 (1973). Some have argued that a property rights solution would have been preferable. *E.g.*, Thomas W. Hazlett, *A Law & Economics Approach to Spectrum Property Rights: A Response to Weiser and Hatfield*, 15 GEO. MASON L. REV. 975 (2008); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990). *But see* Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549 (2008). The Court in *Red Lion* stated that

> [t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

395 U.S. 367, 389 (1969). *See also* Henry Geller, Turner Broadcasting, *The First Amendment, and the New Electronic Delivery Systems*, 1 MICH. TELECOMM. & TECH. L. REV. 1, 4–5 (1995), *available at* http://www.mttlr.org/volone/geller.pdf.

27. *See* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2621 (2007) ("[W]hat is perhaps most important in the context of broadcasting cases is the recognition that the First Amendment can protect speakers from being drowned out by other non-state speakers.").

28. As the Court explained in *Red Lion*,

> Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

395 U.S. at 392 (citation omitted).

29. *Id.* at 387. As the Court further said,

> No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who

the right of the viewers and listeners, not the right of the broadcasters, which is paramount"[30] follows in situations where the public, for noneconomic reasons, does not have access to the means of communication.[31]

The deference granted by the *Red Lion* Court gives the political branches the space to work out regulatory schemes in evolving industries within boundaries established by the Court.[32] This is not to say, however, that the Court's recognition of the need for government regulation in an evolving industry that precludes open access necessarily implies judicial acceptance of regulatory carte blanche. Even when the Court recognized the need for FCC regulation in *NBC, Inc. v. United States*, it nevertheless cautioned that Commission license-allocation decisions grounded on particular viewpoints were impermissible.[33] Since 1927, the Communications Act has precluded administrative agency "censorship" (admittedly without defining the term).[34] The Supreme Court has recognized that the Commission and

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holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

Id. at 389–90.

30. *Id.* at 390.

31. Thus, *Red Lion* need not be read as the Supreme Court's announcement of a fundamental turn from an autonomy-based interpretation of the First Amendment.

32. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 48 n.88 (1994) (characterizing the reasoning of *Red Lion*, *Turner Broadcasting Co. v. FCC*, and *Tornillo* as "makeweight" and suggesting that the decisions "can best be reconciled by reference to the 'paramount importance' to the Court 'of according substantial deference to the predictive judgments of Congress'") (citation omitted). The Eskridge and Frickey article describes law as the product of "a balance of competing institutional pressures" that produces a "stable equilibrium when no implementing institution is able to interpose a new view without being overridden by another institution." *Id.* at 32. Thus, the Court's deference to Congress in the broadcast context, by contrast to its lack of deference to state legislatures in the print context, may be explained by the nature of the interdependent institutional relationships rather than in purely doctrinal or even policy terms.

33. The Court stated that

> Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

NBC, Inc. v. United States, 319 U.S. 190, 226 (1943).

34. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1091 (1934) (codified as amended at 47 U.S.C. § 326 (2000)) ("Nothing in this Act shall be understood

broadcasters walk a "tightrope"[35] in attempting both to maintain the Commission's role as regulator in the public interest and the licensee's journalistic freedom. The agency views itself as following this articulated path.[36] The bounded deference granted to the FCC is reflected in the less-than-strict degree of scrutiny applied by the Court in its constitutional review of broadcast cases.

Why focus on *Red Lion* principally as a deference case in the mold of other post-New Deal judicial-deference cases[37] rather than as the avatar of a new direction in First Amendment interpretation generally?[38] Principally

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or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station."); Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162 1172–73 (1927) (repealed 1934); *see also* Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 37 (1967). Professor Kalven recognizes that physical signal interference requires broadcast licensing, but asks what the implications are.

> The fact is obvious but the crucial question is: What exactly follows from it? Does a rational licensing policy require that the Commission to some extent consider the service, that is, the kind and quality of the communications furnished? Does it therefore follow . . . that because of the brute fact of licensing, the traditions of the First Amendment cannot help the broadcaster?
>
> If this were true, there would be no regulation of content which would not be within the Commission's powers so long as it was not grossly arbitrary and capricious. And interestingly enough the Commission itself has never claimed this degree of jurisdiction. It has always publicly embraced a position against "censorship." Further, Section 326 prohibiting censorship must refer to something; that is, there must be some regulation which the Commission might try that would defeat the intention of Congress.
>
> My thesis is that the traditions of the First Amendment do not evaporate because there is licensing.

Id.

35. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (indicating that the "role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing" and requires "both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act").

36. *See* Commission Programing [sic] Inquiry, 44 F.C.C. 2303, 2313 (1960) (Report and Statement of Policy) (en banc) (explaining that the Commission sought to "chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States . . . on the other").

37. Recent accounts of administrative law describe the post-New Deal deference of courts to administrative agencies as part of a belief in expertise-based governance models. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007). Even for later courts skeptical of the ability of expertise as such to solve social problems, there has been a tendency to defer to congressional decisions to act through administrative agencies especially in situations where the necessity of regulation is clear. For another recent article describing the Supreme Court's broadcasting cases in terms of deference, see Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 202 (2007).

38. For examples of constitutional theorists who have argued that the First Amendment permits government intervention to enhance speech markets, see BAKER, *supra* note 10, at

because it is an enabling decision—it does not tell the FCC what to do by way of public interest regulation. The Court does not say that the Fairness Doctrine is constitutionally mandated. It even admits the possibility that the passage of time, changed technology, or better evidence of a chilling effect of regulation on licensee speech might lead to a contrary result.[39] Nor does the case mandate a new and listener-focused view of the First Amendment.[40] Instead, it defers to administrative choices made to counteract monopoly when the access to speakers that would ordinarily be expected from a communicative medium is foreclosed for reasons other than the speakers' inability to pay. It allows a government regulatory agency to remain neutral with regard to speech content even after it has chosen speakers to license.[41] This reading of *Red Lion* maintains the decision's vitality and ensures that the FCC has regulatory flexibility to identify and respond to the right objects of media policy today.

124–62; OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 384 (1999); and Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987).

39. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378–79 n.12 (1984) ("[W]ere it to be shown by the Commission that the Fairness Doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." (second alteration in original) (citation omitted)).

40. The Court in *Red Lion* said that

> [b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

395 U.S. at 390 (citations omitted).

41. Another way of looking at *Red Lion* is to say that it is a case in which the Court finds that the Constitution does not stop Congress and its agency from deciding to legislate governmental neutrality among ideas. In other words, having selected one applicant for the license could be perceived as the government's authorizing or standing behind or associating itself with the licensee's viewpoints or editorial choices. By requiring something like the Fairness Doctrine, and perhaps even a right of access, the government would be untangling itself from the promotion of a particular licensee's editorial choices or viewpoints. It would effectively be trying to establish a neutral governmental association as between different views. Having made the quality judgments in the initial licensing process, the Commission is permitted (by the Court's reading of the First Amendment in *Red Lion*) to distance itself to some degree from its chosen licensees by imposing a version of an access regime based on proxy or trustee notions.

II. A GRANULAR APPROACH TO THE HISTORY OF PUBLIC INTEREST BROADCAST CONTENT REGULATION

Much of the literature addressing FCC content management in the public interest is very critical. For a variety of reasons, FCC critics have proclaimed that public interest regulation has been—and perhaps would inevitably be—a "dismal failure."[42] Critics challenge public interest regulation as such because of the breadth and vagueness of the concept; the wide discretion it grants the FCC; its fundamentally political character; its prior failures; and the constitutional tension it implicates.[43] But what else can be learned from how the agency has interpreted its mandate?[44] What is the metastory of public interest content regulation by the FCC since the 1920s?

History shows that the FCC's public interest regulation has been far

42. *See, e.g.*, Varona, *Out of Thin Air*, *supra* note 7, at 149, 163 (noting the FCC's failure to enforce public interest programming requirements); Varona, *Changing Channels*, *supra* note 9, at 52–89 (assessing the FCC's failure to define the public interest standard); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2102 (1997); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 193–96 (1978); Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233 (2004) [hereinafter Hazlett, *All Broadcast Regulation Politics Are Local*]. *See also* Hazlett, *Physical Scarcity*, *supra* note 20, at 944 (1997) (describing broadcast regulation not as an effective response to market failure, but "driven by the rents available to licensees on the one side, and the gains available to political actors from the influence over a medium of pervasive social importance on the other").

43. *See infra*, notes 140–46 and accompanying text. As early as 1928, for example, the FRC noted that its delegated power to regulate in the public interest, convenience, and necessity was subject to critique. 2 FRC ANN. REP. 166 (1928), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 127, 129 (2d. ed. Frank J. Kahn ed., 1973) [hereinafter DOCUMENTS]. One of the critiques was that the standard was too broad and gave too much discretion to the Commission. *Id. See also* Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295 (1930), *cited in* HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 116, 116 n.9 (1999). Scholarship that focuses on the political aspects and explanations for what the Commission has done in the name of the public interest include SUSAN L. BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960 (Praeger 2004); and ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION (1973). *See also* ZUCKMAN ET AL., *supra*, at 117 ("The nature of the public interest has fluctuated in part because of the political outlook of those who administer the law. . . . As former FCC Commissioner Ervin Duggan put it, 'successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it.'"). Monroe Price has described the "laborious, inconsistent work" of developing a meaning of the public interest standard as "a product of interactions between the Commission, the industry it regulated, Congress, the courts, and the White House." PRICE, *supra* note 22, at 163.

44. According to a major communications law hornbook, "[o]ne thing that all [conservative and liberal critics] can agree on . . . is that the meaning of the 'public interest' has changed over time." ZUCKMAN ET AL., *supra* note 43, at 117.

from unitary. In fact, the idea of "public interest" or "public trustee" regulation of the media (particularly in the context of programming) has undergone a series of four transformations—at least in the Commission's rhetoric—since the birth of radio. The FCC's decisions about broadcast programming reflects four approaches: (1) the melting pot approach; (2) the community representation approach; (3) the market approach; and (4) the targeted, hybrid regulatory approach.[45]

A. The "Melting Pot" Approach

Although the Commission's statutory invitation to regulate in the "public interest, convenience and necessity" has never been statutorily defined,[46] the Federal Radio Commission (FRC) and the FCC began their regulatory interventions assuming a substantive vision of the public interest grounded on a particular view of the social and political role of radio.[47] A review of both the programming rules and the rhetoric of this early period shows that the FRC and FCC saw radio as appealing to a broad audience and promoting a common culture to serve a homogenizing and unifying social role; providing programming that would take advantage of the ability of radio to create mass access and a mass audience; serving, not as an opinionated speaker itself, but as the conduit for speech and entertainment geared to the mass audience; and responsible for the public interest station by station, not market by market. The early regulators saw radio as the basis of a shared national culture—a way of establishing national narratives.[48] They had a conception of "a public, separated from the government, separated from specific persons, that has the right of

45. For an account that categorizes the history of public interest regulation as dividing along a democracy model and an efficiency model, see Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 387–89 (2006).

46. Early on, the public interest standard was described as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

47. It is true, however, that there was a significant shift in the early days of radio regarding how best to effectuate that vision of the public interest. Specifically, American radio began with an adamant prohibition of advertising. PAUL STARR, THE CREATION OF THE MEDIA 338 (2004). Within a short period of time, advertising-supported commercial radio was touted as the best way of accomplishing the public interest goals of benefiting the listening public. *Id.* at 338–39, 354–57. This is not inconsistent with the notion that the Commission sought to promote a particular goal, however. Rather, it represents a shift in attitude and prediction about what methods would likely best promote the goal.

48. PRICE, *supra* note 22, at 10, 19, 158, 160, 163. Professor Price has concluded that "[w]ithout hyperbole, it could be said that the history of [U.S.] broadcasting involved the creation of a more homogeneous United States out of its culturally dissimilar and previously antagonistic parts." *Id.* at 19.

expression."[49] The development of radio as a commercial, nation-building instrument was not, however, a "natural," uncontested result of legislative and public consensus. Rather, it flowed from legislative and administrative choices rejecting a noncommercial communications regime advocated in the early 1920s.[50]

What demonstrates this? In its 1929 *Third Annual Report*, the FRC, predecessor of the FCC, took the position that "the public interest dictated a preference for stations serving the general public rather than stations serving 'private or selfish interests.'"[51] The agency said so, at least in part, to justify its spectrum-allocation decisions that effectively favored commercial broadcasters over stations with educational, religious, or civic missions.[52] The interests of the listening public would be promoted by commercial stations because such stations, "were interested in obtaining the largest possible audience, while nonprofit stations served only particular groups such as students or members of a church. A commercial station would present alternative views on a subject, while a nonprofit would naturally tend only to present its own perspective."[53]

The Commission during those years characterized commercial, advertising-supported stations as "general public service stations."[54] It stated that licensees serving the public interest were stations seeking to serve "the entire listening public within the listening area of the station."[55]

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49. *Id.* at 164.

50. *See generally* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935, at 5 (1993) (providing "a revisionist interpretation of American broadcasting history, one that regards the emerging status quo [of corporate, commercial, advertiser-supported radio] as the product of an intense and multifaceted political fight with obvious winners and losers, not as the 'natural' American system or as the product of consensus").

51. STARR, *supra* note 47, at 351; *see also* 3 FRC ANN. REP. (1929), *reprinted in* DOCUMENTS, *supra* note 43, at 136 [hereinafter FRC 1929 ANNUAL REPORT]. This position echoed the statements by then-Secretary of Commerce Herbert Hoover at the Fourth National Radio Conference in 1925: "The ether is a public medium and its use must be for public benefit. . . . The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution." Herbert Hoover, Sec'y, Dep't of Commerce, Opening Address Before the Fourth National Radio Conference (Nov. 9–11, 1925), *in* PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE AND RECOMMENDATIONS FOR REGULATION OF RADIO 7 (1926), *available at* http://earlyradiohistory.us/1925conf.htm.

52. *See* STARR, *supra* note 47, at 351 (discussing spectrum allocation); *and* MCCHESNEY, *supra* note 50, at 26–27 (noting that the *Third Annual Report* departs from the previous *1928 Annual Report*, inter alia, by distancing itself from the prior report's antipathy toward advertising).

53. STARR, *supra* note 47, at 352.

54. *Id.*

55. FRC 1929 ANNUAL REPORT, *supra* note 51, at 34, *reprinted in* DOCUMENTS, *supra* note 43, at 136; MCCHESNEY, *supra* note 50, at 27.

The FRC called for each licensed station to air a balanced or "well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place."[56]

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56. Great Lakes Broad. Co., FRC ANN. REP. 32 (1929), *aff'd in part and rev'd in part*, Great Lakes Broad. v. FRC, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930), *reprinted in* DOCUMENTS, *supra* note 43, at 136.

> [T]he emphasis is on the listening public, not on the sender of the message. It would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the [C]ommission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.

Great Lakes Broad. Co., 3 FRC ANN. REP. at 33. *See also* DOCUMENTS, *supra* note 43, at 139 (rearticulating the goal of a "well-rounded program best calculated to serve the greatest portion of the population in the region to be served"); FRC 1929 ANNUAL REPORT, *supra* note 51, at 32–35.

There would subsequently be some variations in the way in which the Commission would characterize and measure such service, but one key element remained constant. The FRC originally said that it did not "propose to erect a rigid schedule" for various types of programming and articulated its "confidence in the sound judgment of the listening public . . . as to what type of programs are in its own best interest" in 1929. *Id.* at 34–35; DOCUMENTS, *supra* note 43, at 136. At other points, the agency became a bit more specific, providing lists of programming categories deemed likely to serve the public interest—thereby suggesting the appropriateness of some level of programming macromanagement by the key commonality remained the Commission's belief that the public would benefit from general public service stations rather than stations advancing any particular points of view.

The agency staff prepared what came to be called the Blue Book in 1946. The Blue Book called for licensees to devote an adequate amount of time to issues of public concern, to air a reasonable number of sustaining rather than sponsored programs (meaning programs paid for by the station rather than an advertising sponsor), and to identify the programming they aired in six identified categories. FED. COMMC'NS COMM'N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 12–39 (Mar. 7, 1946) [hereinafter Blue Book]. The Blue Book was occasioned by FCC Chairman Paul Porter's recognition that the FCC had been issuing license renewals for stations "even in cases where there [was] a vast difference between promises [about programming] and performance." Harry Cole & Patrick Murck, *The Myth of the Localism Mandate: A Historical Survey of How the FCC's Actions Belie the Existence of a Governmental Obligation to Provide Local Programming*, 15 COMMLAW CONSPECTUS 339, 350 (2007) (quoting Porter speech to National Association of Broadcasters in 1945). While the Blue Book began from the proposition that "[p]rimary responsibility for the American system of broadcasting" is left to the licensees and networks, it nevertheless sketched out a rather detailed vision of appropriate programming. Blue Book, *supra*, at 54; *see also* Varona, *Changing Channels*, *supra* note 9, at 21 and sources cited therein. The industry reaction to the Blue Book was at best mixed, and the Commission itself neither adopted the report nor repudiated it. DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 739 (5th ed. 1990).

The next FCC attempt to address programming was the Commission's 1960 *En Banc Programing Inquiry Statement*—probably the most detailed of the Commission's instructions to broadcasters about their content obligations. Commission Programing Inquiry, 44 F.C.C. 2303 (1960) (Report and Statement of Policy) (en banc). *See also*

The Commission's substantive vision of the public interest at least implicitly rested on a belief that radio should not cater to the values of fragmented audiences with potentially conflicting interests but rather should serve as a homogenizing and unifying creator of shared values.[57] Thus, it prohibited "propaganda stations"—those geared toward sub-communities of interest (such as labor) or groups with particular points of view.[58] As the agency put it in 1929,

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Robinson, *supra* note 20, at 912 ("The most detailed instructions were contained in the so-called *En Banc Programming* [sic] *Statement*."). In the *En Banc Programing Inquiry Statement*, the agency listed fourteen categories of programs generally considered necessary to serve the public interest:

> (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, [(10)] news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.

44 F.C.C. at 2314 (1960). *See also* Varona, *Changing Channels*, *supra* note 9, at 22–23.

57. In *Great Lakes Broadcasting*, for example, the Commission stated that "[b]roadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals." Great Lakes Broad. Co., 3 FRC ANN. REP. 32, *reprinted in* DOCUMENTS, *supra* note 43, at 133. *See also* MICHELE HILMES, RADIO VOICES: AMERICAN BROADCASTING, 1922–1952 (1997) (focusing on entertainment programming and discussing the national narratives fostered by radio in its early years); Cole & Murck, *supra* note 56, at 339 (arguing, inter alia, that the FRC did not impose obligations to provide locally oriented programming in the 1920s); STARR, *supra* note 47, at 367 (describing the shift from stations with local orientation to stations with standardized mass entertainment orientation).

58. FRC 1929 ANNUAL REPORT, *supra* note 51, at 34 (This language can also be found in DOCUMENTS, *supra* note 43, at 137.). The Commission also stated that because "[t]here is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether," FRC 1929 ANNUAL REPORT, *supra* note 51, at 34, it would not license stations focusing on particular audiences or viewpoints. *See* MCCHESNEY, *supra* note 50, at 28, 66–67, 70 (describing the FRC's refusal to extend hours of operation for nonprofit "Voice of Labor" WCFL on the ground that numerous groups—such as Masons or Odd Fellows—might also "demand the exclusive use of a frequency for their benefit"); *and* LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935, at 183–84, 185–89 (2001) (describing license renewal fights over WEVD, a "nonconformist" station providing "service to labor and other minorities ignored by mainstream stations"). In Professor McChesney's view, the Commission's prohibition of propaganda stations meant that

> ownership by any group not primarily motivated by profit automatically earmarked a station to the FRC as one with propaganda inclinations. . . .
>
> This interpretation of the public interest, convenience or necessity was a clear endorsement of the private commercial development of the airwaves. . . . Even if propaganda stations attempted to "accompany their messages with entertainment and other program features of interest to the public," the FRC asserted they did not merit the same treatment as general public service stations that did the same things since, among other things, the propaganda stations would be "constantly subject to the very human temptation not to be fair to opposing schools of thought."

MCCHESNEY, *supra* note 50, at 27–28 (citation omitted). *See also* DOCUMENTS, *supra* note

> There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece of the ether. . . . Propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense) are not consistent with the most beneficial sort of discussion of public questions.[59]

The Commission also signaled its views that some kinds of broadcast content were inconsistent with the public interest. For a number of years, it prohibited editorializing by station licensees.[60] The Commission warned against stations "who consume much of the valuable time allotted to them" for "matters of a distinctly private nature."[61] It refused to renew licenses if the radio operator was principally using the license as a way to enhance private nonbroadcast income, challenge mainstream social authority, or articulate extreme points of view.[62] The agency frowned on the airing of

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43, at 137.

59. DOCUMENTS, *supra* note 43, at 136–37 (explaining its reasoning as follows: "If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest."). *See also* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 614 (1998) (describing how the Commission "used its programming regulatory powers cautiously during the 1930s and early 1940s, with the exception of forcing most of the remaining propaganda stations off the air").

60. In 1941, the Commission explicitly stated in a license renewal decision that "the broadcaster cannot be an advocate" and that radio stations should not air their own editorials. Mayflower Broad. Corp., 8 F.C.C. 333, 340 (1941). It was almost a decade later, in 1949, that the Commission eliminated its rule prohibiting editorializing on the air and adopted the Fairness Doctrine. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949) (Report of the Commission). The reversal of the anti-editorializing rule was apparently opposed by the ACLU, which doubted that the Fairness Doctrine alone would suffice to check station propaganda. *See* Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 772 n.14 (1972).

61. Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience, or Necessity, 2 FRC ANN. REP. 166, 169 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 132; STARR, *supra* note 47, at 365.

62. *See, e.g.*, KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 670–71 (D.C. Cir. 1931) (affirming the FRC's denial of renewal to station operated by quack Dr. John Brinkley to promote his pharmaceutical products and supposedly virility-enhancing operation of transplanting goat glands into men with sexual problems); Trinity Methodist Church, S. v. FRC, 62 F.2d 850, 854 (D.C. Cir. 1932), (affirming the FRC's decision not to renew the license of Los Angeles station KGEF, owned by Reverend "Fighting Bob" Schuler, who aired diatribes against local politicians, judges, Jews, and Catholics); BENJAMIN, *supra* note 58, at 89–107 (2001). In both the *Brinkley* and *Schuler* cases, the reviewing courts rejected the licensees' contentions that the FRC's actions amounted to censorship prohibited under the Communications Act. A listeners' poll in 1929 indicated that Brinkley's station was America's most popular station. STARR, *supra* note 47, at 365. Nevertheless, the Commission found that it was operated principally in Brinkley's "personal interest" and that Brinkley had failed to meet his burden that he was operating in the public interest. The medical establishment at the time doubtless disapproved of Brinkley. BENJAMIN, *supra* note 58, at 90, 92. The FRC's articulated concern in the case that Brinkley

phonograph records rather than live music.[63] Lotteries and fortune-telling were also discouraged.[64] Thus, early public interest radio regulation demonstrated particular assumptions about audiences, communities, the role and possible impact of radio, and the appropriate degree of government involvement in shaping public discourse.

The Commission's vision was also reflected in the voluntary choices of broadcasters: "While federal law constrained the diversity of broadcasting in one way, the ascendancy of the networks curtailed it in another."[65] The development of radio networks during the early period led to the increasing airing of national fare.[66]

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was practicing medicine during programs in which he prescribed his patent medicines for ailments described in listeners' letters may reflect that view. The *Schuler* case as well involved nonmainstream programming. The Reverend Shuler defamed public officials challenging, de facto, local government; his anti-Semitic and anti-Catholic diatribes were divisive and potentially inflammatory—results at odds with the notion of radio providing a common culture and national stability. *Id.* at 107; J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity," in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 61 (Max D. Paglin ed., 1989).

63. 2 FRC ANN. REP. 166, 168 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 130–31. In prohibiting excessive phonograph music, the FRC presumably was trying to imagine what kinds of new uses the innovative medium could provide for the mass public that the audience could not find elsewhere. In a statement made in 1928, the FRC said that

> the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form. For example, the public in large cities can easily purchase and use phonograph records of the ordinary commercial type. A station which devotes the main portion of its hours of operation to broadcasting such phonograph records is not giving the public anything which it cannot readily have without such a station. . . . The [C]ommission can not close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program.

Statement Made by the Commission on August 23, 1928, *supra* note 61, at 168 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 127, 130–31.

64. *See* STARR, *supra* note 47, at 365.

65. *Id.* at 367. Those networks were, in themselves, enabled in part as a result of the spectrum allocation rules adopted by the FRC. *Id.* at 349, 352–54. This is not to say that the networks were allowed to develop without any regulation. Rather, structural regulations designed to curb the power of networks were justified on the ground that excessive network control of programming would shortchange licensee's ability to transmit local programming. NBC, Inc. v. United States, 319 U.S. 190, 226 (1943).

66. Before the late 1920s, there was a profusion of stations with a local orientation. . . . Rather than being melded into a mass culture, Americans listening to radio in the 1920s were able to sustain their varied cultural and class identities. The rise of the networks brought a shift to entertainment created for a national audience: comedy and variety shows with national celebrities, soap operas, westerns and detective shows, and sports programs . . . . Like television in the 1950s, AM network radio in the 1930s (and after) avoided programming that appealed only to particular cultural groups.

STARR, *supra* note 47, at 367. *See also* LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919–1939 (1990), *cited in* STARR, *supra* note 47, at 466 n.26.

This approach to the public interest is consistent with the context in which radio broadcasting was developing at that time. Paul Starr argues that in the period after World War I, American society was both more diverse—with increases in immigration from abroad and migration of African-Americans to the north—and more reflective of nationalist and nativist sentiment from those resisting the diversification of the country.[67] National programming that would promote assimilation rather than fragmentation could be a useful response at a time when the homogeneity of the country was breaking down.

Everyone in the early days sounded a common theme about the power of radio. Then-Secretary of Commerce Herbert Hoover set the tone in his early remarks at the Third National Radio Conference:

> Radio has passed from the field of an adventure to that of a public utility. Nor among the utilities is there one whose activities may yet come more closely to the life of each and every one of our citizens, nor which holds out greater possibilities of future influence, nor which is of more potential public concern. . . .
>
> Radio must now be considered as a great agency of public service . . . .[68]

Thus, he argued that radio was "a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities."[69] At the same time that regulators saw radio's extraordinary potential, they also feared its potential ill effects.[70] After all,

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67. STARR, *supra* note 47, at 233–35.

68. Herbert Hoover, Sec'y, Dep't of Commerce, Opening Address Before the Third National Radio Conference (Oct. 6–10, 1924), *in* RECOMMENDATIONS FOR REGULATION OF RADIO ADOPTED BY THE THIRD NATIONAL RADIO CONFERENCE 2 (1924). *See also* Hazlett, *Physical Scarcity*, *supra* note 20, at 920 (describing recognition of radio's importance in the 1920s).

69. PRICE, *supra* note 22, at 160 (quoting Hoover in a 1924 address before Congress). Professor Price sees the language of the public sphere entering the early conception of the public airwaves: "for some visionaries, radio was conceived not as a mere medium of entertainment, not even as a linear extension of the newspaper, but as something wholly new, a major mechanism for improving the nature of American democracy." *Id.* According to Paul Starr, broadcasting "promised to change society. The promise of broadcasting, even more than earlier media, was to make culture accessible to all, to enable the electorate to become better informed, to put people instantaneously in touch with the news of the world." STARR, *supra* note 47, at 347.

70. In 1926 a congressman stated,

> There is no agency so fraught with possibilities for service of good or evil to the American people as the radio . . . . [Broadcasting stations] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and politics will be largely at the mercy of those who operate these stations.

PRICE, *supra* note 22, at 161. *See also* STARR, *supra* note 47, at 348 (noting that between 1927 and World War II, "radio threatened to distort [democracy]" because "there developed

radio propaganda was instrumental in the war in Europe.[71] Democratic and progressive legislators, who were critical of the largely conservative ownership of daily newspapers at the time, feared one-sided radio representing the conservative views of its owners.[72] Programming "invaded the sanctity of the home."[73] There was debate about whether radio should become largely a mainstream commercial medium and whether advertising would harm the resource.[74] The radio operators were not seen at the time as speakers in their own right. The notion that there were more potential speakers than stations justified the view that the licensees—while not common carriers—should program for the public at large rather than as purveyors of their own views or those of narrower publics.[75]

The Judiciary at the time was extremely deferential to the Commission's decisions.[76] After a difficult first year, in which the agency attempted to operate without a budget and when two of the original Commissioners died, the FRC began to make "constitutive" allocation and assignment decisions that aligned the agency's interest with increasingly powerful and moneyed commercial broadcasters.[77] In exchange for the allocation of

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an interdependence between those who held political power . . . and those who controlled radio").

71. *See* NBC, Inc. v. United States, 319 U.S. 190, 228 (1943) (Murphy, J., dissenting) ("Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression."); *see also* STARR, *supra* note 47, at 342 (noting that the Nazis "centralized [broadcasting] control under their Ministry of Propaganda" and that during the 1930s "[t]hroughout continental Europe, governmental supervision of broadcasting became the rule, even where the stations were normally in the hands of private corporations").

72. *See* STARR, *supra* note 47, at 350 (discussing southern and western congressmen's perception of networks as "a new form of northeastern cultural domination"); *cf.* Colin Vandell, *Words Signifying Nothing? The Evolution of § 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J. 443, 446 (2005) (explaining that "[t]he impetus for campaign coverage regulation provisions . . . came from emerging fears in Congress during the 1920s that radio networks had too much unilateral influence over national elections").

73. STARR, *supra* note 47, at 364.

74. *Id.* at 338, 353–56, 363. *See generally* THE FUTURE OF MEDIA, *supra* note 16.

75. Professor Price has suggested that this kind of perspective reflected seeds of a Habermasian conception of the public sphere in the early regulatory environment. *See generally* PRICE, *supra* note 22.

76. *See, e.g.*, Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 851 (D.C. Cir. 1932) (affirming the FRC's refusal to renew appellant's license "[on] the ground that the public interest, convenience, and/or necessity would not be served by the granting of the application"); KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931) (affirming the FRC's refusal to renew physician's broadcasting license on the finding that his broadcasts were not in the public interest and noting that "we do not think that it was the intent of Congress that we should disturb the action of the [C]ommission in a case like the present").

77. STARR, *supra* note 47, at 350.

spectrum, these broadcasters promised to operate in the general public interest.[78] This convenient quid pro quo protected both the large commercial broadcasters from the potential competition from other entrants, and the Commission, whose view of the public interest coincided with the provision of mainstream fare at the highest available level of broadcast quality for the listening audience. Although the Commission's specific programming pronouncements during this period may not in fact have been the most significant determinants of broadcast programming,[79] the media structure that the government chose and the Commission's rhetorical directive to commercial broadcasters were most consistent with audience aggregation, whether at the local or national level.

B. The Community Representation Approach

Starting in the 1960s and peaking in the 1970s, the FCC changed its articulation of how licensees should satisfy their public interest programming obligations, although the agency showed some ambivalence about its role in policing the public interest.[80] During this period, the Commission began to articulate the public interest as more clearly a representational notion rather than a category to be defined either by the FCC or by broadcasters in tandem with advertisers seeking to please the tastes of the general audience. Rather, the Commission emphasized the broadcaster's obligation to ascertain the needs of its audience—including subaudiences—and to program responsively.[81] This suggests recognition

78. *See, e.g.*, MCCHESNEY, *supra* note 50, at 18–29 (discussing the FRC's 1928 "reallocation of the airwaves" and its interpretation of public interest, convenience, or necessity); Hazlett, *Physical Scarcity*, *supra* note 20, at 931 ("[T]he objective of broadcasters in lobbying for licensing legislation was to exclude new entrants while maintaining existing frequency rights. . . . It was correctly augured that the public interest standard would create a constitutional basis for legally denying such entry.").

79. For example, Former Commissioner Glen Robinson articulates a skeptical view of the Commission's commitment to the program standards it adopted in the 1960 *En Banc Programing Inquiry Statement*:

> The list [of desired programming] is remarkable for its comprehensiveness, but more so for its irrelevance, for it was never meaningfully enforced. Though the 1960 *En Banc Programming* [sic] *Statement* remains the official statement of programming policy, the Commission has never bothered to bring it up to date, probably because it recognizes that it never was in touch with reality.

Robinson, *supra* note 20, at 913.

80. I take the Commission's failure to enforce program standards during this period, *see id.*, as evidence of regulatory ambivalence. For a more detailed discussion of this point, see *infra* note 86.

81. As the D.C. Circuit Court of Appeals later described it,

> Over the years, the Commission had developed detailed procedures for licensees to follow in order to determine the needs and interests of the communities served and so to provide responsive programming. The requirements included compiling

by the Commission—at least in its rhetoric—both of the diversity of broadcast audiences and the notion that their interests should be served even if the unregulated, advertising-driven broadcast market would not independently generate responsive programming. The Commission's rules also began to focus more on the process by which public affairs programming would be created than the overall programming mix—both entertainment and nonentertainment—that the Commission thought would lead to overall broadcasting in the public interest. Moreover, the rhetoric was local.[82]

A central piece of evidence suggesting this development is that the agency moved away from program categories to issue-responsive programming.[83] It adopted extremely detailed rules for licensees to be able to determine community needs and problems via formal and informal ascertainment rules.[84] These ascertainment rules required licensees to

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demographic data, conducting public opinion polls, interviewing community leaders, and developing lists of problems and issues facing the community. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971), *amended* 33 F.C.C.2d 394 (1972) [hereinafter Ascertainment Primer].
Office of Commc'n of the United Church of Christ v. FCC (*UCC III*), 707 F.2d 1413, 1421 (D.C. Cir. 1983).

Hints of this representational approach were evident even in the 1960 *En Banc Programing Inquiry Statement*—which succeeded the Blue Book as the Commission's next significant review of the programming obligations of licensees. Comm'n Programing Inquiry, 44 F.C.C. 2303 (1960) (Report and Statement of Policy) (en banc). There, the Commission proposed a process of "assiduous planning and consultation" by stations, including "canvass[ing] the listening public" and a broad variety of community leaders in order to inform itself of the needs and interests of their licensing communities. *Id.* at 2316. Although Commission rhetoric had previously imposed on licensees a general (and vague) obligation to program in the public interest, the *En Banc Programing Inquiry Statement* clearly tied this obligation to programming responsive to ascertained community needs and interests. The *En Banc Programing Inquiry Statement* also for the first time explicitly tied broadcasters' economic interests with the provision of programming desired by the community—creating a link between programming choices and the market that would later come to dominate communications policy in the 1980s. *Id.*

82. *See, e.g.*, PRICE, *supra* note 22, at 164 (describing the Commission's 1960 report as emphasizing broadcasters' obligation to identify "the needs of their community" and suggesting that the report served to create "a false image of the United States as a congregation of local communities").

83. *UCC III*, 707 F.2d at 1427, 1430–31. In this review of the Commission's deregulation of radio, the D.C. Circuit Court of Appeals recognized the Commission's reorientation from program categories to the notion of issue-responsive programming—programming responsive to community issues—and approved the shift as a reasonable reinterpretation of the public interest standard at least in part because programming meeting the former categories of public interest programming could likely be used to satisfy issue-responsive programming obligations as well. The court concluded as follows: "In short, then, while the Commission has clearly reoriented its public interest inquiry away from categories, the extent and foreseeable consequences of that policy shift should not be overestimated." *Id.* at 1431.

84. *See* Ascertainment Primer, *supra* note 81, *reprinted in* DOCUMENTS, *supra* note 43,

identify and poll the views of significant groups in the licensees' broadcast areas.[85] The licensees would then have to demonstrate that they aired programming responsive to such identified community problems and needs. The goal of the ascertainment rules was presumably to displace not only market-driven licensees, but also the government in the determination of appropriate programming goals.

With respect to license renewals, the standard appeared to rest on whether the licensees had satisfied their promises by their performance during the prior license term. The promise–performance model was presumably intended to be an accountability mechanism measurable by objective criteria. It certainly obviated substantive government second-guessing about programming choices made by the broadcast licensees.

Developments at the agency did not follow a perfectly linear path in one direction, however. The agency did not enforce either its ascertainment rules or its license renewal standards very stringently.[86] It also showed

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at 316 (setting forth a series of questions and answers "to clarify and provide guidelines as to Commission policies and requirements"). The D.C. Circuit has explained that the formal ascertainment rules "were the end-product of many years of policy experimentation by the Commission. The basic principle underlying ascertainment is clear: For a radio licensee to provide programming responsive to the issues facing the community, it must first ascertain just what those issues are." *UCC III*, 707 F.2d at 1435. At first, in 1960, the FCC "simply required the broadcaster to provide a statement describing the measures taken and efforts made 'to discover and fulfill the tastes, needs, and desires of his community or service area.'" *Id.* at 1435–36 (citing Deregulation of Radio, 84 F.C.C.2d 968, 1073 (1981) (Report and Order)). Thereafter, the Commission "continued to clarify and refine this requirement" and ultimately issued the 1971 Ascertainment Primer discussed above. *UCC III*, 707 F.2d at 1436.

85. According to the D.C. Circuit, the Ascertainment Primer

> set out the procedures to be followed in determining the demographic composition of the service area: consulting with community leaders in 19 categories (e.g., business, minority groups, women's organizations, environmental and consumer groups, etc.); conducting general public opinion surveys; and then developing a list of community problems and needs to serve with responsive programming.

Id. at 1436. Former Commissioner Glen Robinson has characterized the ascertainment approach as follows: "Perhaps the most obviously silly [FCC] endeavor was its erstwhile policy of requiring licensees to engage in a process known as 'ascertainment of local needs'—a largely ritualistic exercise the sole redeeming benefit of which was to give the agency an excuse for not looking at licensees' actual programming." Robinson, *supra* note 20, at 939 n.158.

86. *See* Cole & Murck, *supra* note 56, at 360–61 (describing extensive numbers of license renewals despite questions regarding the stations' programming in the public interest). In what may be the most obvious of these cases, the Commission initially permitted the 1964 renewal of WLBT, a television station in Mississippi, despite clear evidence of racism in programming, refusals to program for the station's African-American viewing population, and refusals to provide time for African-American groups to reply to station editorials. For a description of the events and the Commission's actions, see Office of Commc'n of the United Church of Christ v. FCC (*UCC I*), 359 F.2d 994 (D.C. Cir. 1966) and Office of Commc'ns of the United Church of Christ v. FCC (*UCC II*), 425 F.2d 543 (D.C. Cir. 1969). Ultimately, after sixteen years of litigation, the Commission did not renew

some ambivalence about the Fairness Doctrine.[87] Nevertheless, even if the

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the license. *See also* Sidney A. Shapiro, United Church of Christ v. FCC*: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 946 (2006) (noting that the FCC's refusal to renew the station's license marked the station as "one of the very few broadcast licensees ever to lose a license renewal proceeding").

Even though WLBT shows that (in the absence of judicial review) the Commission tended to renew licenses despite plausible claims that the stations were not programming in the public interest, it does not undermine the claim in text that the 1960s and 1970s were a period in which the agency developed the notion of the public interest as community-group representation. It is important to remember that the WLBT case began in the early 1960s, that it involved the possibility of license nonrenewal (which the Commission recognized as a "death sentence" rather than mere punishment), that the Commission did reduce the duration of the license renewal at one point, that the agency claimed (in what was a "makeweight" argument, according to Professor Shapiro, *id.* at 959), that service would have been lost if the license had not been renewed, and that much of the issue revolved around standing. In addition to these distinctions, it might well have been the case that the later shift in the Commission's conception of the public interest was influenced by the lengthy WLBT saga. *Cf.* Cole & Murck, *supra* note 56, at 357–58 (characterizing the Commission during this period as "an ambivalent, if not contradictory, agency" because of its willingness to impose local programming obligations on licensees while simultaneously disclaiming authority to involve itself in defining such programming because of concerns about freedom of speech).

87. On the one hand, the Commission retained the Fairness Doctrine and continued to employ the rhetoric of balance. There were some highly publicized Fairness Doctrine cases. On the other hand, the Commission only once attempted to enforce the first prong of the Fairness Doctrine against a licensee. Patsy Mink, 59 F.C.C.2d 987 (1976).

Moreover, its implementation of the Fairness Doctrine's second prong was limited as well. For example, the Commission's requirements for a complainant's prima facie case of Fairness Doctrine violations were procedurally onerous. It did not monitor programming itself and relied solely on complaints. The agency also used a "good faith" standard regarding broadcaster showings and required licensees to air balanced viewpoints in their overall programming rather than within single programs. Indeed, these are some of the reasons which led critics to conclude that the Fairness Doctrine as enforced could not accomplish its goals. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 20, at 262–63.

Finally, the agency rejected attempts to expand the scope of the doctrine. For example, cases attempting to use the Fairness Doctrine broadly to go after what groups perceived as "overall media bias" were unsuccessful because of the Commission's narrow and licensee-protective interpretations of what constituted a controversial issue of public importance and what would be deemed to constitute balance. *See* Am. Sec. Council Educ. Found. v. CBS, Inc., 63 F.C.C.2d 366 (1977), *aff'd on reh'g en banc sub nom.* Am. Sec. Council Educ. Found. v. FCC, 607 F.2d 438 (D.C. Cir. 1979); Thomas J. Krattenmaker & L.A. Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 169–70.

Similarly, when the FCC decided that the Fairness Doctrine would not be applied to product advertising as such, it limited the degree to which regulation would be used to challenge the dominance of consumerism on radio and television. *See* Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1, 12, 21–25 (1974) (Fairness Report), *aff'd sub nom.* Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095, 1116 (D.C. Cir. 1977) [hereinafter Fairness Report]. Earlier, the Commission had applied the Fairness Doctrine to cigarette advertising. *See* WCBS-TV, 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082, 1098–99 (D.C. Cir. 1968). Thereafter, the Commission faced complaints about viewpoints implied in entertainment programs and advertising for products other than cigarettes. *See, e.g.*, Friends of the Earth v. FCC, 449 F.2d 1164, 1170–71 (D.C. Cir. 1971) (applying the Fairness Doctrine to advertising of high-powered cars). Faced with a potentially daunting

Commission did not consistently enforce its rules, the Commission's rhetoric suggests that it had revised its notion of community from a hypothetical "average" audience connected as a national community by radio and television networks to a more fragmented alternative whose interests would have to be addressed were the medium to fulfill its mission.

Why did the Commission move in the direction of community responsiveness?[88] One explanation is that the Commission became more concerned about the potential constitutional conflict that its own direct intervention in programming might cause. Many of the administrative and judicial rulings during this period emphasize the importance of broadcasters' expressive freedom.[89] Thus, the highly micromanaging ascertainment rules could be seen as a proxy for more direct FCC content regulation. In other words, the agency instead sought to engage in "architectural censorship"—namely, regulating content indirectly by requiring stations to meet procedural ascertainment requirements which the agency believed would likely lead to sufficient public interest programming.[90] At a minimum, using structural regulations and procedural requirements as proxies for more direct content regulation would likely reduce the First Amendment scrutiny to which the Commission's rules would be subjected.[91] In addition, more objective criteria for assessing

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task of applying the doctrine to all product advertisements—because implicit viewpoint claims could be made about many—the Commission stated that entertainment programming and commercials would be generally exempt from the Fairness Doctrine unless they explicitly and intentionally sought to express viewpoints on controversial issues of public importance. *See* Fairness Report, *supra*, at 12, 21–25.

Whether it believed that programming responsive to the issues and concerns of particular community groups would be likely to lead to overall programming balance on controversial issues, whether it began to harbor doubts about the community-creating effects of balanced programming, or whether it began to look at the overall market, the FCC's ambivalence toward the Fairness Doctrine at this time is consistent with a move away from the undifferentiated general audience to a recognition of multiple communities with potentially different and conflicting interests.

88. There have been several very useful accounts of FCC regulation that have focused on political accounts of FCC behavior. *See, e.g.*, KRASNOW & LONGLEY, *supra* note 43. The account presented in this Essay does not reject the political story. It simply chooses a different focus.

89. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973) ("Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new."); *see also* Comm'n Programing Inquiry, 44 F.C.C. 2303, 2306 (1960) (Report and Statement of Policy) (en banc) ("The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment to the Constitution.").

90. *See* Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005) [hereinafter Yoo, *Architectural Censorship*]. *See also* Cole & Murck, *supra* note 56, at 358 (contending that the FCC wished to create a regulatory regime "which, if complied with, would effectively (but indirectly) compel broadcasters to do something which the FCC could not obligate them to do").

91. *See* Yoo, *Architectural Censorship*, *supra* note 90, at 715–23 (arguing that under

broadcasters' compliance with their public interest mandates could also silence criticisms about the vagueness and inconsistency of the Commission's public interest programming decisions. After all, observers note that "[b]eginning in the early 1960s, federal administrative agencies were under attack from a wide variety of critics."[92] Finally, procedurally grounded objective standards could in principle create broadcasters' accountability to the community itself.[93]

Another consistent explanation for the Commission's switch to process and representation focuses on the increasing visibility of issue-oriented community groups during this period.[94] In addition to the judicial invitation given to private attorneys general by the D.C. Circuit's decision in *United Church of Christ*,[95] the skirmish over renewal standards in Congress in the 1970s[96] as well as increasing social sensitivity to issues facing minorities would doubtless have sensitized the Commission to the existence of different perspectives on social issues held by different community groups. It would have been difficult for the Commission to be blind to the ways in which the decade of the 1970s challenged (as well as reinforced) national narratives. Yet, just as the challenges posed by

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current precedent, proxy content regulation would be unlikely to be subjected to strict constitutional scrutiny, but contending that it should be).

92. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1149 (2001).

93. An alternative explanation is that the FCC, captured by the broadcast industry, changed its rules and adopted a highly proceduralist approach in order to make it easier for broadcast licensees to meet their obligations. The ascertainment rules were quite clear, after all, as opposed to general statements about programming obligations in prior Commission guidelines, and would therefore be easy to comply with, at least formally. Arguably, if the ascertainment rules were seen as purely formal and not ever taken seriously by the agency, then broadcasters would not have taken them seriously either in deciding upon their public interest programming. On the other hand, Commission inaction could not be guaranteed and potential sanctions were fearsome. Moreover, broadcasters' complaints about the onerous burdens imposed on the industry by the ascertainment rules suggest that stations in fact expended resources on the ascertainment process and perhaps even took it seriously.

94. *See* KRASNOW & LONGLEY, *supra* note 43, at 36–41 (discussing examples of community groups which successfully negotiated for "stronger representation in broadcasting" for various ethnic and racial groups, better program balance in advertising, certain amounts of ad-free children's programming, and other community interests) (internal quotation marks omitted).

95. Office of Commc'n of the United Church of Christ v. FCC (*UCC III*), 707 F.2d 1413 (D.C. Cir. 1983); *see also* PRICE, *supra* note 22, at 165–66 (discussing the public interest movement); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389 (2000) [hereinafter Schiller, *Enlarging the Administrative Policy*] (describing the move from interest group pluralism to participatory administration).

96. In 1969, public outrage and claims of racism derailed a bill providing that the FCC could not consider competing applications for broadcast licenses unless it first found that renewal of the incumbent's license would not be in the public interest. *See* KRASNOW & LONGLEY, *supra* note 43, at 114–19.

immigration in the 1920s led to the adoption of national narratives of assimilation, the social developments of the 1970s required some recognition of diversity. Nevertheless, while the Commission appeared to recognize the conflicting views and interests of various groups during this time, it nevertheless sought to use the media as educative tools that would promote unity in a diverse community.[97] A process-oriented regulatory regime that required broadcasters to hear the different voices of their communities is reminiscent of the "safety valve" theory of the First Amendment: social fragmentation can be avoided if different voices are heard and responded to by mainstream institutions.[98]

The effect of this shift in its public interest orientation was to reduce direct control by the FCC in broadcasters' content choices. While the Commission still purported to obligate licensees to program in the public interest, broadcasters were put in the position of having to negotiate programming with community groups if they were to comply with the agency's procedural rules. It is true that because of the Commission's timid record on performance assessments during this period, its apparent ambivalence about involvement in broadcast content, and perhaps its capture by the regulated broadcast industry,[99] broadcasters were not often held accountable to the FCC. Judicial intervention took up some of the regulatory slack, however: it was principally through judicial intervention that public interest programming purportedly responsive to community issues was promoted. With the D.C. Circuit's recognizing for the first time the right of interest groups to challenge FCC action[100] and articulating a doctrine of "hard look" review for administrative decisions,[101] the Judiciary

97. *See generally* Ascertainment Primer, *supra* note 81.

98. For sources discussing the safety valve rationale for First Amendment protection, see, for example, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884–86 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). *See also* Whitney v. California, 274 U.S. 357, 375 (1927).

99. Many have accused the FCC of having been captured by broadcasters. *E.g.*, KRASNOW & LONGLEY, *supra* note 43, at 23, 31–35; *and* Varona, *Changing Channels*, *supra* note 9, at 78–85, and sources cited therein. For the classic explication of agency capture, see MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79–82, 86–97 (1955).

100. *See, e.g.*, Office of Commc'n of the United Church of Christ v. FCC (*UCC I*), 359 F. 2d 994 (D.C. Cir. 1966); *and* Office of Commc'n of the United Church of Christ v. FCC (*UCC II*), 425 F.2d 543 (D.C. Cir. 1969).

101. *See, e.g.*, Citizens Commc'ns Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971). For a description of the D.C. Circuit's "hard look" review, see, for example, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (Leventhal, J.) (stating that a reviewing court should "intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems"). For more on hard look review, see Schiller, *Rulemaking's Promise*, *supra* note 92; Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of Hard Look*

attempted to infuse more transparency into the administrative process[102] and created the possibility of judicialized interest-group pressure on the Commission and broadcasters.

C. The Market Approach

As has been extensively described by others, the FCC's vision in the 1980s turned deregulatory,[103] pursuant to the views of Chairman Mark Fowler and the Reagan Administration ideology.[104] During this period, the FCC eliminated the detailed ascertainment rules,[105] the Fairness Doctrine,[106] many license-renewal requirements,[107] and structural regulations designed to promote diversity of programming.[108] The Commission ceded control of broadcast programming formats to the market.[109] The agency also clarified that it no longer required licensees "to

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Doctrine in the D.C. Circuit, 90 GEO. L.J. 2599 (2002).

102. *See generally* Reuel E. Schiller, *Enlarging the Administrative Polity*, *supra* note 95 (showing connections between regulatory agencies, the courts, and pluralist theories of politics in the mid-twentieth century).

103. *See, e.g.*, Varona, *Out of Thin Air*, *supra* note 7, at 158–59.

104. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); *see also* PRICE, *supra* note 22, at 167 ("The economic metaphor of the market-place gained immense power, such power that the former construct (ascertainment, content requirements, and fairness) virtually became an object of ridicule.").

105. *See* Deregulation of Radio, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part*, Office of Commc'n of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter Radio Deregulation Order]; Deregulation of Radio, 96 F.C.C.2d 930 (1984) (Second Report and Order); Office of Commc'n of the United Church of Christ v. FCC, 779 F.2d 702 (D.C. Cir. 1985); Deregulation of Radio, 104 F.C.C.2d 505 (1986); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), *recon. denied*, 104 F.C.C.2d 358 (1986), *aff'd in part and remanded in part sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) (eliminating formal requirements for the ascertainment of community needs and obligations to maintain program logs).

106. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5049–50 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

107. The Commission simplified the renewal process during this period, including elimination of program-related questions that had been part of the prior process. *See* ZUCKMAN ET AL., *supra* note 43, at 117, and sources cited therein. In fact, the Commission adopted a "postcard renewal" system during this period. *See* Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 46 Fed. Reg. 26,236 (May 11, 1981) (Report and Order); *see also* Varona, *Changing Channels*, *supra* note 9, at 27–28 (describing deregulation).

108. *See, e.g.*, Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 49 Fed. Reg. 31,877, 31,887 (Aug. 9, 1984) (eliminating the "seven station" rule—which had prohibited any person from holding interests in more than seven stations in the same broadcast service).

109. The Commission decided to leave entertainment program format choices—classical or rock, for example—to the licensees, even if a licensee's proposed format change would

be responsive to issues facing the entire community or facing every significant group in the community; instead, the broadcasters may focus on the needs of their own audiences if they can show that other stations are providing adequate service for the other groups."[110] The by-then-traditional notion that each station had public interest obligations to all the groups in its license area was superseded by an approach that looked at the availability of issue-oriented programming across an entire market.

This is the era of communications policy during which the market was to replace both the FCC and political groups as the determinant of the public interest. The Commission began explicitly to think of the broadcast audience as consumer rather than citizen. This market focus shifted the meaning of the public interest to what the public found interesting—clearly a shift to the preferences of individual viewers or listeners instead of some notion of programming for community needs. Although the Commission still purportedly used "community responsiveness" as its metric for licensee performance, the notion of responsiveness—or at least the ways in which responsiveness would be measured—had changed. Such responsiveness was to be measured by general market acceptance rather than programming to respond to the subcommunity interests identified by polling community groups. Consumer satisfaction would be more accurately measured by objective market metrics than FCC assumptions. The shift from ascertained community needs to Nielsen ratings as determinants of the public interest focuses less on the concerns of identity and community groups than on the media-content preferences of individuals within consumption-related demographic categories.[111] In a world in which broadcasting still represented the mass media and programmed for the common denominator, and in which networks were still powerful, broadcasters' programming choices would generate majority-preferred programming rather than satisfy the interests of the

eliminate a unique format in the market. On appeal, the D.C. Circuit held instead that the Commission should, in certain circumstances, hold hearings to inquire whether continuation of the old formats would serve the public interest. *See* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250 (D.C. Cir. 1973); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 929 (D.C. Cir. 1973); Citizens Comm. to Preserve the Present Programming of the "Voice of the Arts in Atlanta on WGKA-AM and FM" v. FCC, 436 F.2d 263, 272 (D.C. Cir. 1970). The Supreme Court affirmed the agency's decision, holding that the agency's policy was consistent with the Communications Act and that at least in the area of entertainment programming, the Commission could reasonably conclude that the market was a better measure of the public interest than FCC regulation. FCC v. WNCN Listeners Guild, 450 U.S. 582, 604 (1981).

110. *UCC III*, 707 F.2d at 1421.

111. *Cf.* Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 513 (2000) ("[T]he idea that broadcasters show 'what viewers want' is a quite inadequate response to the argument for public interest obligations.").

minority of viewers and listeners or those of underserved identity groups.[112]

The FCC justified its deregulatory turn by relying on the failure of the old public interest regulatory approach to achieve its aims, the need to reduce the power of government, concerns about the First Amendment rights of broadcasters, the enhanced availability of media other than broadcasting, the end of spectrum scarcity, and the failure of regulatory arguments grounded on broadcast exceptionalism.[113] Broadcasters took up the mantle of the First Amendment in litigation, pointed to the extraordinary efflorescence of other media, and sought to portray themselves as classic speakers akin to newspapers.[114]

The deregulatory "purge of the 1980s left commercial broadcasters with very few tangible public interest programming obligations."[115] The narrowing focus on the individual media consumer as the object of regulation meant the Commission was reluctant to exercise the regulatory discretion permitted by *Red Lion* to promote certain types of content to satisfy community needs. During this period, most of the Commission's deregulatory decisions met with judicial approval. In the 1990s, the courts, which appeared increasingly to doubt the scarcity argument for exceptional regulation of broadcasting, began to subject even structural regulation to significantly more stringent constitutional scrutiny.[116] There were even calls for the termination of the FCC.[117] This was a far cry from the early days of radio in which there was unanimous agreement that the new technology needed to be regulated with respect to content and quality in order to meet its obligations to the audience.

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112. *See id.* at 515–16 (describing informational cascades that can mistakenly lead to broadcaster homogeneity even with respect to majority audiences).

113. In a statement emblematic of these attitudes, then-Chairman Mark Fowler described television as nothing more than "a toaster with pictures." Bernard D. Nossiter, *Licenses to Coin Money: The F.C.C.'s Big Giveaway Show*, 241 NATION 402, 402 (Oct. 26, 1985) (quoting Fowler's comment). These were also some of the arguments used by the Commission in its decisions to eliminate the Fairness Doctrine and deregulate radio. *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5049–50 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

114. For an important early description of the "ideological drift" of the First Amendment during this period, see J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 873–74 (1993).

115. Varona, *Out of Thin Air*, *supra* note 7, at 159.

116. For a description and critique of this development, see BAKER, *supra* note 10, at 124–62.

117. *See, e.g.*, PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 4 (1997) ("It is time for fundamental change. It is time for the Federal Communications Commission to go.").

D. The Targeted Return to Public Interest Regulation

The FCC's regulatory approach to content regulation began to change in the 1990s and 2000s. Specifically, the Commission commenced a limited return to public interest programming requirements, increased its focus on enforcement, adopted disclosure requirements about programming, and experimented (quietly) with mixed regulatory models.[118] Simultaneously with its increased regulatory interventions, however, the Commission continued, and even expanded, deregulation in the media structure context.[119]

Substantively, the agency's regulatory focus narrowed to the needs of a single constituency: content regulation targeted the protection of children.[120] The Commission focused its attention on child-centered programming regulation such as children's educational television requirements[121] and limits on broadcast indecency.[122] While the public

118. The rationales for and limits to a return to a more regulatory model during this period were articulated in law review articles by then-Chairman Reed Hundt. *See, e.g.*, Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996) [hereinafter Hundt, *The Public's Airwaves*] (arguing for clear, limited and well-enforced public interest obligations).

119. *See, e.g.*, Candeub, *supra* note 10, at 1555–62 (describing the history of FCC media ownership rules).

120. Indeed, a more politically focused account would suggest that the FCC's regulatory focus on children occurred at the behest of a constituency of social conservatives seeking to use the trope of child protection to achieve certain broader social aims. A clear example of regulation responsive to such interest group pressure is the current FCC's enhanced indecency regime. Lili Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1 (2008), *available at* http://www.firstamendmentcenter.com/about.aspx?id=19102.

121. In 1996, the Commission adopted guidelines for children's educational television that defined such programming for the first time and that allowed broadcasters who aired three hours of such programming per week to receive expedited staff-level approval of their license renewal applications with respect to compliance with the Children's Television Act. *See* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,662 (1996). This educational "kid-vid" requirement was extended to digital broadcasters thereafter. *See* Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943 (2004).

Accounts of what led to the adoption of the children's education processing guidelines differ. For example, former FCC Chairman Reed Hundt focuses on congressional concern about children's educational programming to justify the requirements. *See, e.g.*, Reed E. Hundt, Keynote Address, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 539–47 (1996) [hereinafter Hundt, Keynote Address]; Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 17, 22–23 (1996). Former Commissioner Glen Robinson, on the other hand, recounts a more political story:

> The FCC's chairman sought to mollify critics of this "giveaway" [of a second television channel to incumbent broadcasters in order to facilitate the digital conversion] by insisting that the broadcasters ought to give something in return for the new channel—specifically, educational children's television and free air time for political candidates. The first was forthcoming. Faced with the possibility of having to buy the second channel, the major networks agreed to provide at least three hours

interest regulation at issue in *Red Lion* was regulation intended to enhance mainstream public discourse, the new initiatives in public interest content regulation today are more focused on cultural rather than political space.[123] Recently, the Commission also adopted a requirement of a quarterly filing in which "television broadcasters must provide more information on the local programming they are broadcasting and facilitate the public's access to that information."[124] While the requirement is simply a disclosure rule, the structure of the required form can easily be read as an implicit return to content suggestions by the FCC.

The agency procedurally increased its focus on the effectiveness of its executive role by selective increases in the enforcement of its rules, particularly in the area of indecency.[125] The Commission also experimented with a "play or pay" regulatory regime in the context of children's educational television.[126] Finally, the agency has engaged in

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per week of children's educational programs.

Robinson, *supra* note 20, at 918–19. Professor Robinson also concludes that "[t]he new children's television rules are not really predicated on scarcity; they are the product of a deal between the broadcasters and the FCC in which three hours of children's television is exchanged for an exemption from the emerging movement for selling radio spectrum." *Id.* at 930.

For histories of the Commission's approach to children's television, see, for example, NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 17–57 (1995); Angela J. Campbell, *Lessons from Oz: Quantitative Guidelines for Children's Educational Television*, 20 HASTINGS COMM. & ENT L.J. 119, 137–49 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1, 2–8 (1997).

122. *See, e.g.*, Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4982 (2004) (holding that NBC's airing of an expletive during the awards show violated federal law, and notifying broadcasters that future airings of the same word could result in enforcement action). *See generally* LEVI, *supra* note 120 (providing an overview of the FCC's regulation of indecency).

123. Of course, § 315 of the Communications Act of 1934 still imposes on broadcasters the obligation to provide "equal opportunities" to political candidates in the purchase of political advertising time, and § 312(a)(7) provides federal political candidates a right of "reasonable access" to purchase advertising time.

124. News Release, Fed. Commc'ns Comm'n, FCC Requires Television Broadcasters to Provide More Local Programming Information to the Public (Nov. 27, 2007), http://www.fcc.gov/headlines.html; *see also* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 F.C.C.R. 1274 (2008) (Report and Order) (noting the adoption of new reporting requirements).

125. *See generally* LEVI, *supra* note 120 (describing FCC's indecency regulation regime).

126. *See* Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1339–42 (2007) (describing children's educational television rules, which permit broadcasters to pay for educational programming to air on other stations in the market under certain circumstances). The FCC's website does not disclose instances of broadcasters taking advantage of the pay-or-play option for children's educational programming, however, so little can be said about the design or specifics of the model.

indirect public interest regulation via merger conditions or settlement agreements.[127]

One plausible explanation for this regulatory shift is that the 1980s and 1990s reflect the different economic and social faces of the political right during that time. Conservatives in favor of economic deregulation often also favored social regulation to promote family values. But these regulatory initiatives were embraced during both Democratic and Republican administrations. Another possible explanation is that, while the majority of the Commission still hews to a market-based regulatory approach, both Democratic and Republican appointees have become convinced that the market does not adequately represent the needs and preferences of children in broadcasting and thus that this segment of the audience has to be the focus of its regulatory attention.

There are two ways to characterize today's targeted regulatory era. On the one hand, the narrowness of the Commission's regulatory focus differentiates it from the melting pot era. Children have become the principal protected constituency for the Commission. The regulations are targeted and not focused on programming as a whole. The Commission does not justify its involvement by referring to the general listening public or its need for radio as an instrument of democracy. Also, the Commission has insisted since the mid-1990s that its substantive definition of the public interest is not based on its own choices or expertise, but on decisions made by Congress and the American public.[128]

Despite these apparent differences, however, there is a second way to characterize the FCC's current regulatory approach—as a sub rosa revival of the melting pot era during which the Commission sought to promote a certain type of community identity. In other words, a narrow, targeted set of regulations can be Trojan horses for enhanced government control over expressive boundaries more generally. For example, indecency regulation has shown that it is precisely the Commission, using its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium," that determines whether the "average broadcast viewer

127. On settlements in the indecency context, see LEVI, *supra* note 120, at 19–21.

128. For such a position with respect to children's educational programming, see generally Hundt, *The Public's Airwaves*, *supra* note 118; Hundt, Keynote Address, *supra* note 121. As for indecency, the current Commission has sought to characterize itself as a reluctant regulator drafted by Congress and the public. *See* Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L.J. 19 (2007) [hereinafter Levi, Chairman Kevin Martin on Indecency], *available at* http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf.

or listener" would find broadcast material indecent.[129] Thus, the divination of the American public's views is left to the discretion of the Commission. It is the Commission that determines whether a particular depiction or description of a sexual activity is either necessary to the program or gratuitous and pandering, thereby putting the government in the position of second-guessing the producers' editorial judgments.[130] Moreover, the current indecency regime demonstrates excessive responsiveness to the complaints of the Parents Television Council, a particular decency advocacy group.[131] Thus, the market of the 1980s has been supplanted in some content areas with the views of organized issue advocacy groups.

This differs not only from the deregulatory market era, but from the earlier community representation era, during which the broadcasters' public interest programming was likely to have been negotiated to some degree with community groups representing local communities and subcommunities. Now, those organic communities' views and interests are replaced by the pressure brought to bear on the FCC by specific issue advocacy groups. Hand in hand with such advocacy groups and under the guise of the protection of children, the Commission can attempt to define the boundaries of expressive culture on a national basis. In doing so, it is returning to the earliest regulatory era, in which the Commission regulated pursuant to a substantive vision of the public interest. At that time, the FRC believed that the public interest was an interest in public cohesion through the medium of radio and that dissenting voices or those too identified with particular groups would undermine the assimilationist project. Now, the FCC is seeking to police the boundaries of what expression is properly public while deflecting criticism by relying on the uncontroversial slogan that we need to protect our children.[132]

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129. Infinity Radio License, Inc., 19 F.C.C.R. 5022, 5026 (2004).

130. LEVI, *supra* note 120, at 44.

131. *See id.* at 36 & n.215 (asserting that certain interest groups have "dominat[ed] indecency enforcement").

132. Is this criticism mooted by the recent judicial rejections of aspects of the Commission's new indecency regime? The government has been granted certiorari in a case about the propriety of the agency's decision to find a violation of its indecency rules on the basis of a fleeting expletive uttered outside the indecency safe harbor period. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); *see also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008) (vacating and remanding FCC indecency sanctions). It is possible that the Court may revert to the deferential approach of prior broadcasting cases. In addition, there are aspects of the Commission's current regulatory approach that have not been—and are unlikely to be—tested in court. Judicial review has largely been avoided by negotiated resolutions between the Commission and the affected broadcast parties. This is true not only in the context of indecency but also of children's educational programming. Arguably this is not a major problem because the rules would likely pass First Amendment muster anyway, even if they had been subjected to judicial review. Indeed, it may be that the final rules were structured as they were precisely in order to withstand constitutional review. Nevertheless, the Commission's penchant both

III. READING THE HISTORY

What lessons do the different regulatory experiments of the four eras teach us?[133] The first era, the melting pot approach, led to FCC decisions designed to promote a national narrative. It was an approach consistent with what were viewed as the assimilationist needs of its time. It valorized the FCC's expertise, overly involved the government in broadcast content, sought to minimize audience diversity, led to an excessive reliance on commercial national network programming, maintained an illusion of a homogeneous, melting pot culture, and led to structural decisions that would undermine a noncommercial broadcasting model. In seeking to promote a shared national culture, the melting pot approach made constitutive normative choices.

The second era, community representation, seemed to reflect the recognition that diversity narratives were necessary if electronic mass media were to remain socially relevant and influential during this period of social ferment. Yet this era too reflected ambivalence on the part of the Commission. Its recognition of diversity to some degree conflicted with its commitment to balanced presentation as the ideal form of electronic public discourse. In any event, its rules in fact gave too much leeway to broadcasters' claims that they had in fact programmed for the community interests they had identified. The Commission's approach may have often led to the illusion of representation rather than true community participation. The Commission's unwillingness to look closely at the broadcasters' claims that their performance met their promises surely undermined the effectiveness of this kind of more localized community model. Even had it been effective, however, such a community representation model would have raised broader questions about whose views and interests were represented and how to determine the right balance between focused and generalized public interest programming.

In shifting its understanding of the public interest from the community's concerns to the individual consumer's preferences, the third, "market" era overly mythologized and valorized the market, did not pay adequate attention to the negative externalities of broadcaster choices designed to satisfy majority audience preferences, and often erred in its definitions and measurements of the markets. One external critique of the market focus is that the market neither adequately represented the nonmercantile interests

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in the 1990s and now to regulate by agreement and avoid judicial review is troubling.

133. The discussion in text focuses on interpreting the goals and identifying the weaknesses of the FCC's doctrinal developments during the period broadly surveyed. Other approaches as well, such as more explicitly political explanations, could enrich the analysis, but do not eliminate the usefulness of looking at shifts in doctrinal trends. *E.g.*, Commission Programing Inquiry, 44 F.C.C. 2303, 2313 (1960) (en banc).

implicated in the public interest nor the exogenous character of consumer preferences.[134] But even if one were to accept the 1980 FCC's belief in the market as the right standard for the public interest, one could still engage in an internal critique: the Commission's market rhetoric was suspect because the agency did not admit the degree to which the agency's market-structuring decisions affected what was otherwise touted as an apolitical metric and because it refused to address assertions of market failure.

Finally, however it is defined, the new era of targeted regulation is extremely problematic as well. It is either a period in which the Commission is narrowly focusing on a single constituency for defining the public interest, or one in which FCC power is enhanced at the behest of particular advocacy groups while the agency disclaims any affirmative role other than representative of the public.[135] The Commission ironically accompanied its renewed regulatory vigor in "cultural" contexts by deregulation in the context of market structure. The shift from an attempt to enhance the public sphere to a focus on the protection of the private realm transforms the agency from an enabler of public discourse to an enforcer of conservative social norms and word taboos.[136] The children's educational television requirements are also subject to critique.[137] In

134. *See* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997). In Professor Sunstein's words,

> There is a large difference between the public interest and what interests the public. This is so especially in light of the character and consequences of the communications market. One of the central goals of the system of broadcasting, private as well as public, should be to promote the American aspiration to deliberative democracy.

Sunstein, *supra* note 111, at 501.

135. Levi, *Chairman Kevin Martin on Indecency*, *supra* note 128; Levi, *supra* note 120, at 36 & n.215.

136. Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007) (explaining FCC's fleeting expletive prohibition as acquiescence in a word taboo).

That courts have recently struck down some of the most excessive applications of the Commission's indecency regime is not to the contrary. After all, there is much still left to the agency's indecency regulatory regime beyond what has been struck down, and the courts have relied principally on administrative process to ground their reversals. *See CBS Corp.*, 535 F.3d at 167.

137. Some say that the rules impose a minimal obligation, that licensee compliance is spotty, that the programs identified as educational do not in fact warrant the characterization, that parents do not understand the identifying icons for children's educational television, and that stations excessively preempt such programming in order to air other, more profitable, fare. *E.g.*, AMY B. JORDAN, IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL? AN ANALYSIS OF EDUCATIONAL TELEVISION FOR CHILDREN IN THE 1999/2000 BROADCAST SEASON (2000); Amy B. Jordan & Emory H. Woodard IV, *Growing Pains: Children's Television in the New Regulatory Environment*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 89 (1998); Amy B. Jordan, *Public Policy and Private Practice: Government Regulations and Parental Control of Children's Television Use in the Home*, *in* HANDBOOK OF CHILDREN & THE MEDIA 651 (Dorothy G. Singer & Jerome L. Singer eds. 2002); KELLY L. SCHMITT, ANNENBERG PUBLIC POLICY CENTER, REPORT NO. 35, PUBLIC POLICY, FAMILY RULES AND CHILDREN'S MEDIA USE IN THE HOME 10–11 (2000); EMORY H.

addition, the Commission's recent endorsement of disclosure-based regulation is a double-edged sword in light of the increasing use of information by well-organized interest groups to press their own particular visions of the public interest.[138] If the Commission really has narrowed its regulatory interests to children, then its regulatory choices are suspect as ineffective. If, on the other hand, the Commission is trying to engage in broad-based social regulation under the innocent guise of child protection, then the current regulatory era is even more dangerous than the first.

Some say that enhanced regulation is the answer to perceived problems with the media. There have been recent calls for the return of the Fairness Doctrine.[139] By contrast, others say that the Fairness Doctrine was a failed attempt to enhance public discourse[140] and that the FCC should retire from active content regulation in the public interest.[141] Critics have even gone so

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WOODARD IV & NATALIA GRIDINA, ANNENBERG PUBLIC POLICY CENTER, SURVEY SERIES NO. 7, MEDIA IN THE HOME 2000: THE FIFTH ANNUAL SURVEY OF PARENTS AND CHILDREN 32–38 (2000). Moreover, little empirical work has been done to answer the question of whether children's educational programming rules are truly necessary for over-the-air broadcasters in today's media environment—in which both PBS and cable provide a plethora of excellent children's programming.

138. *See supra* note 131 and accompanying text.

139. Despite criticism, bills to revive the Fairness Doctrine are often introduced in Congress. *E.g.*, Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. (2005); Meaningful Expression of Democracy in America Act, H.R. 4710, 108th Cong. (2004). There is a current legislative debate as to the reintroduction of the Fairness Doctrine. *See* John Eggerton, *McCain Backs Bill to Block Fairness Doctrine*, BROADCASTING & CABLE, June 29, 2007, http://www.broadcastingcable.com/article/CA6456710.html (describing legislative developments related to reintroduction of the Fairness Doctrine); *see also* Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845 (2008) (calling for the adoption of a new Fairness Doctrine).

140. For important critiques of the Fairness Doctrine, see, for example, BAKER, *supra* note 10, at 195–97; KRATTENMAKER & POWE, *supra* note 20, at 237–75; LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 108–20 (1987); Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POL'Y 87 (1987); Thomas W. Hazlett, *Physical Scarcity*, *supra* note 20, at 933–39; Krattenmaker & Powe, *The Fairness Doctrine Today*, *supra* note 87, at 151–52; Yoo, *supra* note 20; *see also* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (assessing the effects of the abolition of the Fairness Doctrine). *But see* Patricia Aufderheide, *After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest*, 40 J. COMM. 47, 68 (1990) (finding that the Fairness Doctrine did not cause a chilling effect and that broadcasters during the Fairness Doctrine years provided more balanced commentary than after the Fairness Doctrine's demise).

141. *E.g.*, THE MEDIA INSTITUTE, RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed. 1997); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 48 (abr. student ed. 1965); KRATTENMAKER & POWE, *supra* note 20; BERNARD SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY Vol. 4, 2374 (1973); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcasting Must Fail*, 95 MICH. L. REV. 2101 (1997); Robinson, *supra* note 20; Varona, *Changing Channels*, *supra* note 9, at 18–26. *See generally* Hazlett, *Physical Scarcity*, *supra* note 20, at 991; Hazlett, *All Broadcast Regulation Politics Are Local*, *supra* note 42.

far as to express doubt about whether the FCC could *ever* effectively regulate in the public interest.[142]

This Essay does not propose a defense of the FCC's attempts to regulate broadcast content in the past: "The rules struck down or diminished had hardly been a model of the public sphere."[143] Critics are doubtless right that the Commission's historical reluctance to enforce its program rules has robbed the rules of their maximal power. They are also doubtless right that when the Commission does decide to step up its enforcement, as is evident in its current indecency initiatives, it can do so with disproportionate stringency. Certainly, much of the literature that criticizes the agency for its "revolving door" relationship with its regulated industries, for its party-line decisions, for its responsiveness to political pressure (from the Executive, Congress, and private lobbying groups), and for its timorousness in promoting innovation raises important questions about the wisdom of proposing a return to public interest content regulation.[144] So do the arguments that characterize the Commission as structurally, politically, and ideologically limited, inclined toward the mainstream, and hostile to more radical challenges.[145]

Despite the persuasiveness of these complaints, however, it is not clear that the Commission would inevitably fail if it experimented with different public interest goals and regulatory methods.[146] In any event, objections based on regulatory failure "presuppose elusive criteria [to assess performance], and the baseline question remains: Compared to what?"[147] Moreover, there remains the question of available choices. Promises that new technology—and the Internet in particular—will make extinct the need

142. As Henry Geller, media theorist and former FCC General Counsel, has recently put it, "[t]he lesson to be drawn from this [FCC] history is that behavioral content regulation is simply unworkable in this sensitive First Amendment area." Henry Geller, *Carl Ramey's* Mass Media Unleashed, 60 FED. COMM. L.J. 391, 392 (2008) (reviewing CARL R. RAMEY, MASS MEDIA UNLEASHED: HOW WASHINGTON POLICYMAKERS SHORTCHANGED THE AMERICAN PUBLIC (2007)). Similarly, Professor Varona, a speaker at this Symposium, has argued that there are three fundamental obstacles to effective FCC content regulation. *See* Varona, *Out of Thin Air*, *supra* note 7, at 163–72; *see also* Varona, *Changing Channels*, *supra* note 9, at 53–89.

143. PRICE, *supra* note 22, at 167. The agency's principles "were often meaningless and harassing, and enforcement was haphazard." *Id.*

144. *But see* CROLEY, *supra* note 16 (critiquing a public choice approach to the regulatory state).

145. BAKER, *supra* note 10, at 196–97; KRATTENMAKER, *supra* note 20.

146. *See, e.g.*, Candeub, *supra* note 10, at 1611 (explaining weaknesses of the FCC's justifications of the media ownership rule and calling for regulations to enhance news production); Sunstein, *supra* note 111. For a recent criticism of libertarian arguments against FCC public interest regulation, see, for example, Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007).

147. CROLEY, *supra* note 16, at 297.

for public interest regulation to promote the public sphere are overstated.[148] The plethora of communicative conduits available today has not in fact led to a flourishing of traditional professional journalism. If technology does not erase the need for attention to the public sphere, and if market structure often leads to an underproduction of serious news programming, then is it wise to reject from the outset an experiment with a different type of regulatory regime in the public interest attuned to those concerns?[149]

A final observation about where we find ourselves. Administrative agencies have predictable incentives to maintain and even increase power. The past several years of FCC activity have shown that both Congress and the Commission understandably seem reluctant to give up the discretion granted the agency by the public interest standard in the communications acts. It may be that the Commission is now politicized to such a degree that it would reverse its regulatory stance if the object of regulation were to be switched to something other than the child protection initiatives favored by social conservatives. On the other hand, the agency's regulatory direction could presumably be influenced by other constituencies as well. Just as the early broadcasters asked to be subject to government regulation in order to protect themselves from ruinous interference,[150] industry views on the kinds of regulation proposed in this Essay are likely to influence the Commission's direction. Moreover, at least some members of the Commission have sought to expand the agency's regulatory footprint in order to promote diversity of viewpoints.[151] A change in presidential

148. *See, e.g.*, BAKER, *supra* note 10, at 88–123. For another dystopian view of the impact of the Internet on community, see CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007)

149. I admit to a number of contestable assumptions imbedded in and questions raised by this proposition. For example, what constitutes "serious" journalism? How do we know that there has been an "underproduction" of such journalism in the mainstream electronic media? Is it not true that regulatory "experiments" often serve either as opportunities for the exercise of discretionary government power against preferred targets or threats in regulatory negotiations?

In addition, theorists have argued that alternatives exist to content regulation in the public interest by the FCC. *See, e.g.*, Hazlett, *Physical Scarcity*, *supra* note 20. Some who do not call for spectrum propertization suggest abandoning FCC content regulation of commercial broadcasters and replacing current regulation with various subsidy proposals whereby commercial broadcasters would be assessed spectrum usage fees or otherwise fund public broadcasting or Internet access. *See, e.g.*, Henry Geller, *Promoting the Public Interest in the Digital Era*, 55 FED. COMM. L.J. 515 (2003); Varona, *Out of Thin Air*, *supra* note 7, at 186–90. This Essay does not address those options, except to note that public broadcasting itself would not resolve the problems identified above and that the inquiry proposed here is not inconsistent with funding-based attempts to enhance public broadcasting and Internet access. So long as the mass electronic media are still most people's preferred media for news, I believe it is worthwhile to explore whether the Commission can help promote journalistic activities and news and public affairs programming by broadcast outlets.

150. Hazlett, *Physical Scarcity*, *supra* note 20, at 931.

151. Commissioners Copps and Adelstein, for example, have argued in favor of more

administration could also influence the Commission's commitments.[152] At least in one reading of broadcast history, the current Commission is engaging in aggressive attempts to structure both an economically deregulated marketplace and a speech environment whose boundaries are set by an agency representing the views of only one segment of the public while purporting to do nothing more than protect children. We are currently in uncertain times with respect to media policy, but the Commission is unlikely to fold its regulatory tent in the near future.

IV. A PROPOSED DIRECTION FOR FUTURE PUBLIC INTEREST PROGRAMMING: PROMOTING JOURNALISM

Assuming that the Commission's regulatory bent will continue at least for the near term, and keeping in mind the critiques catalogued above of current regulatory targets, it is useful to address whether the history of broadcast regulation suggests seeds of a different way to look at the public interest today.[153] This Essay proposes that if the Commission is to continue attempting to regulate in the public interest, it should redirect its attention in two ways.

First, the agency should shift its content focus from indecency and children's programming back to the broader issue of the public sphere. Specifically, the Commission should turn its attention to the need to shore up journalistic values in the electronic press today, as this is a crucial problem besetting the public sphere.[154] We currently face far greater

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stringent regulation in the public interest. *See, e.g.*, Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Stuck in the Mud: Time to Move an Agenda to Protect America's Children, Remarks Before the Media Institute 1 (June 11, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282885A1.pdf (arguing that the FCC needs to play a more effective and productive role to help parents insulate their children from indecent and profane programming); Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Remarks at National Conference on Media Reform 1 (June 8, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282800A1.pdf (discussing the problems of unregulated media); Michael J. Copps, Comm'r, Fed. Commc'ns Comm'n, Remarks at National Conference on Media Reform 1 (June 7, 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282821A1.pdf (charging that it is time to put the FCC "back on the beat").

152. Ira Teinowitz, *Candidates' Differences on Media Outlined*, TV WEEK, July 23, 2008, *available at* http://www.tvweek.com/news/2008/07/candidates_differences_on_medi.php (discussing potential policy changes that may result from the election of either Barack Obama or John McCain as President).

153. This discussion does not address those critiques of public interest regulation that would dispense with it entirely. Rather, it deals with what we currently have in place and whether a change in focus would be desirable. It is beyond the scope of this Essay to suggest and evaluate particular initiatives.

154. Other scholars as well have discussed the importance of promoting independent journalism. *See, e.g.*, BAKER, *supra* note 10, at 33–48; Candeub, *supra* note 10, at 1551 (focusing on amount of news produced); Magarian, *supra* note 139; *see also* Sullivan, *supra*

challenges with respect to journalistic commitments and professionalism in the electronic media than the social concerns posed by fleeting expletives on the air or the fact that more children's educational television can be found on public broadcasting and cable than on the networks.

Second, the Commission should reject direct content prohibitions for all the reasons that have been amply ventilated in the Fairness Doctrine and indecency debates, and instead look to more elastic, regulatorily flexible ways of promoting its desired outcomes. In other words, it should focus on the possibilities of fee- or incentive-based regulation[155]—the carrot rather than the stick—and structure[156] rather than content as regulatory approaches.[157]

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note 22, at 1664–66 (discussing the assumptions about journalistic professional judgments that might underlie First Amendment rights granted by the Court to speech intermediaries).

155. For a discussion of incentive-based communications regulation for the production of programming likely to be underproduced by the market, see Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391–92, 1461–65 (2004) ("The use of subsidies, in the form of cash or non-cash incentives, permits government to pursue media political goals across all media and with far less formidable First Amendment constraints."). Others have suggested that the Commission impose spectrum fees on broadcasters and use such fees to promote, *inter alia*, public broadcasting. *E.g.*, Henry Geller, *Promoting the Public Interest*, *supra* note 149, at 518. I too have argued for an indirect regulatory approach in a prior article, proposing

> (1) structural regulations designed to promote journalistic values; (2) a requirement that broadcasters spend a certain percentage of their gross advertising revenues on news and public affairs production and programming; (3) different options for constructing a requirement that broadcasters devote a percentage of their advertising time to advocacy advertising, for which they would be allowed to be paid a premium over their ordinary commercial rates; and (4) audience empowerment, including disclosure-oriented requirements designed to foster audience activism and strategies to engage an audience whose attention is claimed by an unprecedented abundance of content.

Levi, *supra* note 12, at 1324; *see also id.* at 1370–71.

156. On the connection between journalism and media concentration, see BAKER, *supra* note 10. The overarching argument of *Media Concentration and Democracy* is roughly that deconcentration of ownership promotes democracy not only in itself, but also to the extent that it minimizes the possibility of demagogic power and enhances the likelihood of resources' being devoted to improved journalism and the press's watchdog role.

157. There are various stories, with different emphases, that can be told about the history of the FCC's past regulation of programming in the public interest. One is the story of the political developments underlying agency action. *See supra* note 88 and accompanying text. Another is the administrative state story, which focuses on the relationship between regulatory agency, regulated industries, and the courts, and which reads administrative law as developing from shifts in the courts' visions of the legitimacy of pluralist accounts of politics. *See, e.g.*, Schiller, *Enlarging the Administrative Polity*, *supra* note 95. Yet another is the regulatory approach story, about command-and-control regulation and its alternatives as possible approaches to effective regulation. From explorations of public–private governance models to models of responsive regulation and the "co-regulatory" media initiatives of the EU, scholarly, legislative, and institutional imaginations have been captured by alternatives to "command-and-control" regulation. Outside the media area, the past decade has seen a profusion of "third way" literature that touts public–private regulatory modalities as viable alternatives to traditional command-and-

If we believe that good, serious, professional, independent journalism is an important component of working democracy, it is important to continually measure how well journalistic organs are fulfilling their democracy-enhancing roles.[158] Evidence today casts doubt on both the effectiveness and the credibility of current news purveyors.[159] Modern journalism takes place in an environment of consolidation, hypercommercialization, personalized and targeted advertising (and attendant programming), a polarized, entertainment-driven modern news culture, and attention scarcity. Journalists work in consolidated corporate environments in which media interests are only one slice of the ownership pie, in which shareholder profits are increasingly fetishized, in which advertising is increasingly personalized and targeted, and in which discourse is defined by entertaining extremes.[160] Despite utopian expectations, the alternative media—noncommercial news sources, blogs,

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control regulation. *E.g.*, ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–49 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–404 (2004); Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197, 199–200 (2006). The FCC, in adopting its children's educational television rules in 1996, could be said to have quietly flirted with a fledgling experiment in "third way" public–private governance. Levi, *supra* note 12, at 1338–42. Previously, the agency's reliance on broadcaster self-regulation can be interpreted as an underanalyzed version of the same. It may be that the Commission's history of command without control and the unnoticed passing of its flirtation with a "pay or play" children's television regulatory model suggest that such experiments are unlikely to be successful, and that politics will derail alternatives to classic regulation in media, as some critics would argue. Surely agency capture is a more complex phenomenon when an agency regulates numerous different and competing industries. Politics too is more complex when many powerful parties are involved, creating counterweights to one another. Well-crafted structural regulations and incentive-based rule options are also less likely to trigger judicial concern than did the closed and incumbent-favoring processes of the 1970s FCC.

158. There are of course different views of what constitutes "good" and even "independent" journalism. Different views of journalism can also be matched with different theories of democracy, and therefore one's view of the right social order will influence the types of journalistic norms one promotes. *See* C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 320–48 (1998) (describing the elitist, liberal pluralist, and republican forms of democracy, and associated media). I do not mean to engage those questions in this Essay, however. My principal points are that (1) at the very moment that the FCC is busy stamping out fleeting expletives on broadcast channels during the day, *any* view of democracy-enhancing journalism is being challenged by economic and social developments; (2) one must be vigilant in assessing journalism on an ongoing basis; and (3) it is conceivable (although, of course, far from certain given its history) that the FCC could help the journalistic efforts of the electronic mass media. For a similar view that the FCC can properly regulate to increase news, see Candeub, *supra* note 10.

159. PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2.

160. *See* Levi, *A New Model*, *supra* note 3 and sources cited therein. *See generally* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2 (discussing the challenges of developing a new business model for news media).

and citizen journalists—do not displace the traditional mass media.[161] There is much to be said for a credible mainstream in electronic media journalism.[162] Therefore, it is critical to incubate counterforces to the developments that are undermining conventional professional press norms.[163]

The proposed shift of the FCC's attention to the broadcaster's press responsibilities is responsive to modern concerns about the preconditions for democracy and consistent with the Supreme Court's recognition of broadcast licensees as journalists. It is true that the Court in *Red Lion* did not particularly focus on broadcasters as members of the press engaging in journalistic activity.[164] However, despite the *Red Lion* Court's explicit rhetoric about broadcasters as licensees rather than journalists, its assertion that Congress could limit licensees' freedom to engage in purely commercial behavior is consistent with (and perhaps an invitation to) a view of stations as engaging in journalism. After all, the Fairness Doctrine

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161. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2.

162. Historically, CBS distinguished itself from its competitors ABC and NBC by establishing a reputation as the Tiffany network. *See* Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9, 16 (2005). All three networks had news divisions; however,

> Broadcasters through most of the period since 1934 responded to this perception of a public interest affecting their business by occasionally trying to act like journalists. The presence of a money-losing news department dignified a television network. It was taken to constitute some sort of guarantee that the network understood its own importance, and intended to respond benevolently to those who were dependent on it. Privilege began *noblesse oblige*.

Moglen, *supra* note 23, at 951 (citation omitted). Although the current mass television media environment is far different from the oligopolistic universe of the big three television networks, query whether the profusion of possible options to capture the audience's attention could not generate a renewed effort for brand identity. If so, then is there any way the FCC can help promote a "market for credibility" within the mass media so that at least some of the corporate media outlets perceive credible journalism as an economic plus and seek to brand themselves as the reliable news source?

163. *Cf.* Magarian, *supra* note 139 (arguing for a revival of a new version of the Fairness Doctrine and calling for FCC rules "that would fortify journalistic ethical norms of public service against interference by media owners and advertisers"). Professor Candeub has argued in a parallel vein that the Commission should use the regulation of market structure to enhance the amount of news produced and thereby aid the public in monitoring its government. *See generally* Candeub, *supra* note 10.

164. In 1967, Professor Harry Kalven, Jr. opined that "[o]ne of the genuinely interesting issues raised when we attempt to apply a First Amendment analysis to broadcasting is what difference it makes that broadcasting has been essentially an entertainment medium." Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & ECON. 15, 28 (1967). Perhaps the *Red Lion* Court too was captured by that view of broadcasters—they were not principally speakers, but conduits for entertainment and others' speech. *See also* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 72–73 (1991) (noting *Red Lion*'s description of broadcasters as licensees and monopolies rather than as journalists or press organs).

was intended to induce coverage of public issues and to promote norms of balance—and perhaps even "objective journalism" in the electronic medium.[165] The contrast highlighted in *Red Lion* was the right of the public to hear and the right of the licensee to speak its personal economic interest. But the right of the listener can be exercised both with access systems and with the professional norms of journalism. The Court's constitutional acceptance of the Fairness Doctrine is not inconsistent with different available views of broadcasters, including the journalistic view, if that is the rule adopted by the FCC.

Moreover, cases after *Red Lion* have emphasized the broadcaster's role as press—even when, as in *Arkansas Educational Television Network v. Forbes*, the licensee was a government rather than private speaker, the Court upheld the station's editorial discretion to exclude a candidate from a televised debate.[166] In *CBS, Inc. v. Democratic National Committee*[167] (which rejected a general First Amendment right of access to the air for editorial advertising) we can discern the Court's interest in promoting the journalistic role of the broadcast licensee. There, the Court said the following:

> [I]t seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.[168]

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165. One could argue that the reading in text conflicts with the Supreme Court's interpretation of what the First Amendment protects in the press in *Miami Herald Publishing Co. v. Tornillo*, which struck down a right-of-reply statute for newspapers. 418 U.S. 241 (1974). After all, the *Tornillo* Court emphasized editorial freedom, and the Fairness Doctrine enabled by the *Red Lion* Court seems to co-opt that editorial discretion. The two cases do appear to take different positions on the balance of First Amendment interests and differ in their degree of deference to the legislature. But first there are those who would argue for a broadly interpreted *Red Lion* as the right approach to the First Amendment, rather than the excessively autonomy-focused *Tornillo*. *E.g.*, Baker, Turner Broadcasting, *supra* note 24. Moreover, Professor Baker has characterized *Tornillo* as a classic case in which the First Amendment precluded punishment for choosing to speak, rather than as an acontextual adoption of absolute editorial autonomy as the key theme of the First Amendment. *See* Baker, *Media Concentration*, *supra* note 24, at 852 n.81; Baker, *The Media That Citizens Need*, *supra* note 158 at 399; Baker, Turner Broadcasting, *supra* note 24, at 111–14. In addition, there is arguably a fundamental difference between the access available to speakers in the print as opposed to the broadcast context. In *Tornillo*, the Court could reasonably emphasize the editorial freedom of newspapers as the fundamental First Amendment value because there was still generalized, unlicensed access to newsprint and the public streets. Broadcasting, by contrast, created monopoly licensees selected by the government and precluded generalized access for fear of chaos.

166. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

167. 412 U.S. 94 (1973).

168. *Id.* at 110. While *Red Lion* found the Fairness Doctrine to be constitutionally permissible, *CBS, Inc. v. Democratic National Committee* held that the First Amendment did not mandate a general right of access to the electronic press. Rather, the majority relied

In *CBS, Inc. v. FCC*, even though the Court affirmed the constitutionality of a limited right of access to broadcasters for federal political candidates, the Court reaffirmed that Congress had conferred on broadcasters "the widest journalistic freedom consistent with their public duties."[169]

This raises the following question: what, if anything, could the Commission do to promote increases in the amount and quality of journalistic programming on radio and television?[170] This Essay does not seek to make specific suggestions. It does warn against an automatic continuation of historical forms of command-and-control content regulation (such as the Fairness Doctrine)—not only because of free expression concerns, but also because the history of such FCC regulation is best described as command-without-control. Modestly, it suggests an inquiry on the part of the Commission into how a regulatory approach that promotes electronic journalism can be designed most consistently with even a libertarian view of First Amendment doctrine. The inquiry could be a springboard to a broad debate about our vision of the best use of mass media today.

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on the Fairness Doctrine to ensure sufficient balance in programming, and although the Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), found permissible the statutory right of access granted to federal candidates for political advertising under § 312(a)(7), such access rights were limited to a particular context and did not undermine the general role of the licensee as a press organ. The access rights were for federal candidates to buy advertising time, and did not hinge on any speech decision by the broadcaster. Moreover, the majority in *CBS, Inc. v. FCC* made clear that the right of access would be interpreted by the FCC primarily as an injunction against blanket prohibitions of time sales to federal candidates and a requirement of individual negotiation. *Id.* at 388–89, 396–97.

169. CBS, Inc. FCC, 453 U.S., at 395 (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (characterizing the Communications Act as recognizing journalistic discretion).

170. For a similar suggestion in a broader discussion of media reform, see Levi, *In Search of Regulatory Equilibrium*, *supra* note 12. It is not the purpose of this Essay to make microregulatory suggestions about future public interest regulation by the Commission. In a thoughtful recent article, Professor Candeub articulates a similar point:

> Rather than protect the number of "media voices," the FCC should protect the essential function the media serves in a democracy—to minimize the difficulties citizens face in monitoring government. . . . Media regulation should create ownership structures that maximize the amount of political news, making it easier for citizens to monitor government. . . . Media regulation must encourage industry structures that maximize news output. Research about the effects of industry ownership and geographic structure on the content of political news and political activity could guide this regulation. Setting media structure to maximize news output creates private incentive for certain types of media production but avoids government's direct involvement in content decisions. Even as current media structures shift, however, this Article argues the goal of maximizing political news output with minimal government oversight must guide regulation. With changing media industry structures, this maximization may involve using the tax exemption to encourage political reporting.

Candeub, *supra* note 10, at 1551, 1611.

CONCLUSION

This Essay has argued that the most useful lesson of *Red Lion* and subsequent Supreme Court cases about broadcast content regulation is that the Court is willing to defer to congressional and FCC decisions in the context of regulating the communications commons. In turn, the exercise of the Commission's discretion to regulate in the public interest has reflected several different views of the regulator's role. At one end of the regulatory spectrum, the Commission attempted to regulate content in order to create and cement a homogeneous national narrative. At the other extreme, the agency jettisoned community-building in favor of market-supportive attention to individual viewers' tastes. Currently, we live in an epoch of revived, targeted, but potentially expansive FCC regulatory activity regarding content. This Essay proposes that the Commission shift its focus from the purported protection of children to the protection of the public sphere—a goal it has recognized as central to democracy since the inception of radio regulation.

The protection of the public sphere is a tall order, however. When the Commission has set itself the task of promoting a rich public sphere via command-and-control content regulations, its work has been roundly criticized as an abject failure by First Amendment analysts of all theoretical schools. One option that has garnered praise is for the Commission to retire from the business of regulating to promote the public interest in any sense beyond the technical. The contrary possibility is that the agency should revive its traditional content regulations such as the Fairness Doctrine in order to improve public debate. A third alternative—proposed in this Essay—is for the agency to reframe its understanding of public interest regulation. Such reframing would entail exploration of possible structural regulations to promote independent journalism, and investigations of incentive- or fee-based content regulations to support that goal. In view of the critical reduction of resources committed to professional journalism in today's mass media, the extraordinary fragmentation of audience attention enabled by current technology, and the still-unique ability of "old" electronic media to serve as a universal conduit of information and news for the entire public, modern media policy would be well served if the FCC commenced a serious inquiry into the viability of FCC interventions to enhance the journalistic activities of the electronic media.